

No. 16649 ✓

United States
Court of Appeals
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,
vs.
MILDRED MURPHY,
Appellee.

Transcript of Record

FILED

JAN 15 1960

Appeal from the United States District Court
for the District of Montana.

FRANK H. SCHMID, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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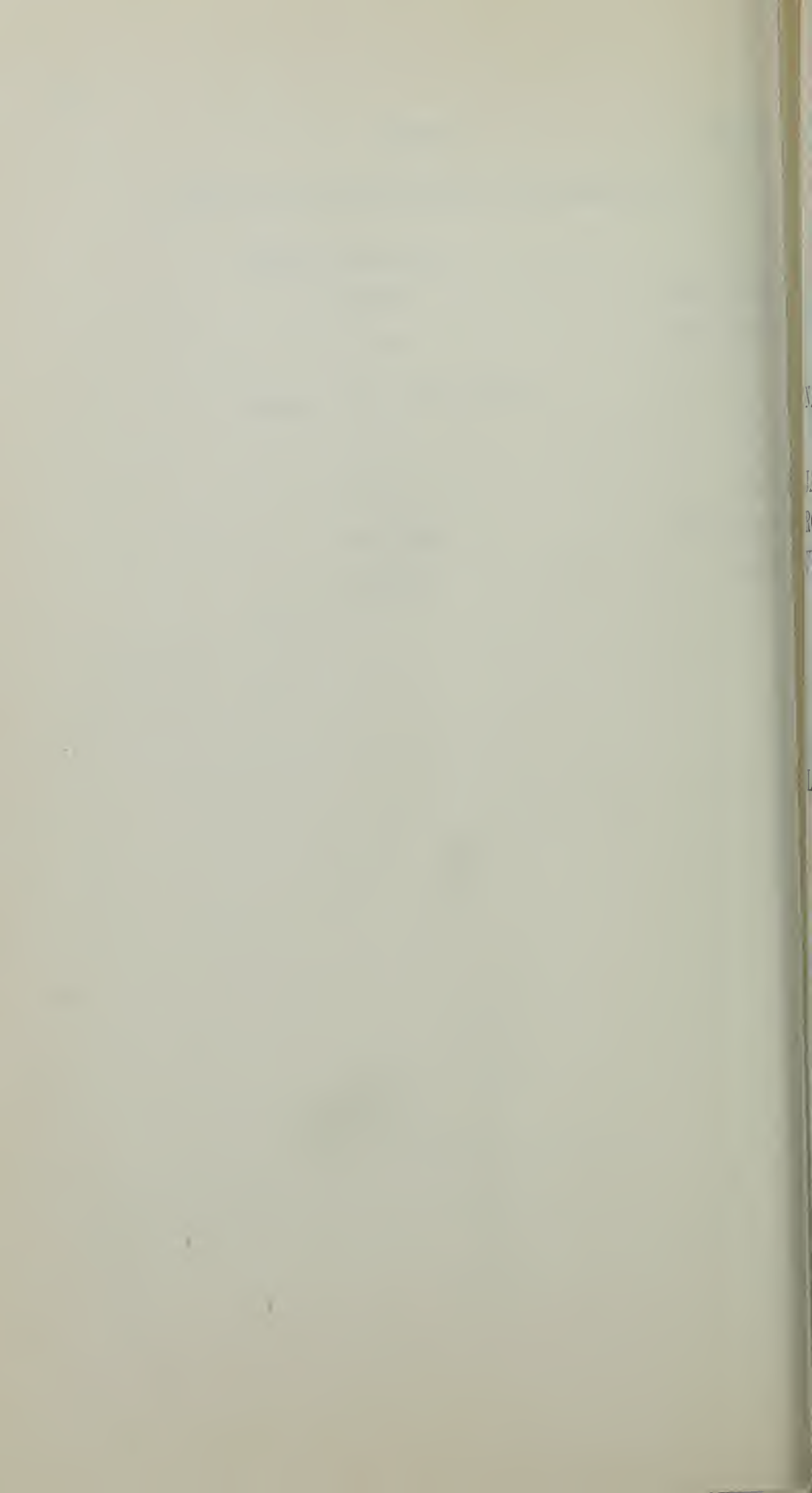
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NAMES AND ADDRESSES OF ATTORNEYS

JAMES A. POORE, JR.,
ROBERT A. POORE,
URBAN L. ROTH,
404 Silver Bow Block,
Butte, Montana,

Attorneys for Appellant and Defendant.

LEIF ERICKSON,
347 North Last Chance Gulch,
Helena, Montana,

Attorney for Appellee and Plaintiff.

In the District Court of the Second Judicial District
of the State of Montana in and for the County
of Silver Bow

No. 49,862

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a
Corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant and for
cause of action alleges:

I.

That at all times herein mentioned defendant was
and is a corporation organized and existing under
and by virtue of the laws of the State of Maryland
and qualified to do business within the State of
Montana, and during the times herein mentioned
owned and operated a grocery store at 55 East
Granite Street in the City of Butte, Montana.

II.

That on or about the 24th day of June, 1958,
plaintiff entered defendant's said store as an invitee
for the purpose of purchasing items of groceries
held for sale by defendant, and in the exercise of
due care, proceeded to walk upon the surface of
the floor of said store, and as a result of the care-
less, reckless and negligent act of defendant,

through its agents and employees as hereinafter alleged, plaintiff was caused to slip and fall, and did slip and fall violently upon the said floor, bruising and injuring plaintiff's head, twisting and wrenching plaintiff's neck, wrenching and injuring plaintiff's cervical and lumbosacral spine; that as a result of such injuries, plaintiff suffers constant severe headaches, constant low back ache, pain in the neck and cervical spine, is extremely nervous and the constant headaches and low back and neck pains make it extremely difficult for her to sleep; that the injuries plaintiff sustained as above set out are permanent in their nature, all to her damages in the amount of Ten Thousand Dollars (\$10,000.00).

III.

That by reason of the injuries sustained as aforesaid, plaintiff has been required to incur medical expense in the sum of Four Hundred Dollars (\$400.00); that she is receiving medical treatment now and will continue to require medical treatment for an indefinite period, and plaintiff estimates the cost of the future medical treatment which will be required at the sum of Two Thousand Five Hundred Dollars (\$2,500.00).

IV.

That plaintiff has for many years last past been employed as a waitress in the City of Butte, Montana; that at the time of the injuries aforesaid, plaintiff was capable of earning, and was earning in wages and tips Seventy Five Dollars (\$75.00)

per week as a waitress; that by reason of the premises, plaintiff has been unable to work since the date of said injury, to her damage in the sum of Three Thousand Dollars (\$3,000.00); that the injuries sustained are permanent and render the plaintiff utterly incapacitated from carrying on her occupation as a waitress and plaintiff will, by reason of the premises, lose future earnings in the sum of Forty Five Thousand Dollars (\$45,000.00).

V.

That defendant was careless, reckless and negligent in that prior to the happening of the injuries herein complained of, defendant, through its agents and employees, placed upon the floor surface of its said store building an excess amount of waxy, oily, slippery substance or material and failed to use reasonable care in applying said waxy, oily, slippery substance or material on the surface of said floor, and failed to use reasonable or ordinary care in the maintenance of said floor after the application of said slippery substance, but allowed said floor to remain in a slippery, hazardous and unsafe condition.

VI.

That the foregoing acts of negligence on the part of the defendant through its agents and employees were the proximate cause of the injuries plaintiff sustained.

Wherefore, plaintiff prays judgment against defendant in the sum of Fifty Nine Thousand Six

Hundred Fifty Dollars (\$59,650.00) and for her costs of suit.

Dated this 10th day of December, 1958.

/s/ LEIF ERICKSON,
Attorney for Plaintiff.

State of Montana,
County of Lewis & Clark—ss.

Leif Erickson, being duly sworn on behalf of the plaintiff in the above-entitled action says:

That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes them to be true; that the said plaintiff is absent from the County of Lewis and Clark where her attorney has his office, and that affiant is plaintiff's attorney and therefore makes this Affidavit.

/s/ LEIF ERICKSON.

Subscribed and sworn to before me this 10th day of December, 1958.

[Seal] /s/ J. R. RICHARDS,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My Commission expires: February 27, 1960.

[Endorsed]: Filed January 2, 1959, U.S.D.C.

In the United States District Court for the District
of Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant.

ANSWER

The Defendant, for answer to Plaintiff's Complaint, admits, denies and alleges as follows:

1.

Admits the allegations of paragraph "I" thereof.

2.

Answering the allegations of paragraph "II" thereof, Defendant admits that on June 24, 1958, the Plaintiff entered Defendant's said store apparently to shop for groceries; denies that the Plaintiff was exercising due or ordinary care; admits that the Plaintiff slipped and fell in said store; denies that such falling was the result of any careless, reckless or negligent act or omission of this Defendant; denies having sufficient knowledge or information to form a belief as to the truth of the allegations of the injuries allegedly suffered by Plaintiff in said fall and therefore denies the same;

denies each and every allegation contained in said paragraph not hereinbefore admitted.

3.

Denies having sufficient knowledge or information to form a belief as to the truth of the allegations of paragraphs "III" and "IV" thereof, and therefore denies the same.

4.

Denies the allegations of paragraphs "V" and "VI" thereof.

5.

Denies each and every allegation in Plaintiff's Complaint not hereinbefore admitted.

And Comes Now the Defendant and for a Further and Affirmative Defense to Plaintiff's Complaint, Alleges:

1.

That any injuries sustained or suffered by Plaintiff at the time and place and on the occasion mentioned in her Complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the Plaintiff in the manner in, and gait at which she walked in Defendant's said store and in her failure to watch where she was going and use ordinary care for her own protection.

Wherefore, the Defendant having fully answered, prays that Plaintiff take nothing by virtue of her

Complaint and that the Defendant have judgment for its costs herein.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

Attorneys for Defendant, Safeway Stores, Inc., a Corporation.

[Endorsed]: Filed February 10, 1959.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at \$36,500.00.

Dated this 20th day of April, 1959.

/s/ NEAL J. LEARY,

Foreman.

[Endorsed]: Filed April 20, 1959.

In the United States District Court for the District
of Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INC.,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on the 15th day of April, 1959, both parties appearing by counsel and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of Thirty Six Thousand Five Hundred Dollars (\$36,500.00),

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant the sum of Thirty Six Thousand Five Hundred Dollars (\$36,500.00) with interest at the rate of six per cent (6%) per annum from the 20th day of April, 1959, and her costs of action.

Dated this 22nd day of April, 1959.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed and entered April 22, 1959.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT IN ACCORDANCE
WITH MOTION FOR DIRECTED VER-
DICT OR FOR NEW TRIAL

Comes now the Defendant, Safeway Stores, Inc., within ten (10) days after the reception of the Verdict in the above-entitled matter, and within ten (10) days after entry of Judgment thereon, and respectfully moves the Court to have said Verdict and the Judgment entered thereon set aside and to have Judgment entered in accordance with Defendant's Motions for Directed Verdict made at the close of the Plaintiff's case in chief and at the close of all the evidence and held under reserved ruling by said Court for the reasons set forth in said Motions.

And, if the foregoing Motion for Judgment not withstanding the Verdict be denied, said Defendant respectfully moves said Court to set aside said Verdict and the Judgment entered thereon and grant said defendant a New Trial upon the following grounds:

1. The Verdict is against the clear weight of the evidence on the issue of Defendant's alleged negligence.
2. The amount of the Verdict is not justified by the evidence and is excessive and predicated upon passion and prejudice.

3. There was substantial error committed at trial in the admission of evidence as to aggravation of a pre-existing injury or ailment contrary to the issues raised by the pleadings and our Defendant's objection; and no amendment of said pleadings having been made and no instruction on the proper damages pertinent to aggravation having been tendered or given although argument was predicated upon the same to the Jury by Plaintiff's counsel.

Respectfully submitted this 27th day of April, 1959.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed April 27, 1959.

[Title of District Court and Cause.]

ORDER

The defendant's motion for judgment in accordance with motion for directed verdict or for new trial having come on for hearing before the Court on the 8th day of June, 1959, and the matter having been fully argued and submitted to the Court, and the Court having considered all of the arguments, and the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered and this does order that the defendant's motion for judgment in accordance with motion for directed verdict or for new trial be and the same hereby is denied in its entirety.

Sufficiency of Evidence

By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase "or the creation of a dangerously slippery condition," so that the instruction read "a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *," it became apparent the Court was adopting the law announced in the cases of *Nicola vs. Pacific Gas & Electric Co.*, (Cal.) 123 P 2d 529; *Cagle vs. Bakersfield Medical Group*, (Cal.) 241 P 2d 1013; *Baker vs. Mannings, Inc.*, (Cal.) 265 P 2d 96; and *Chase vs. Perry*, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection, and thus the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant.

The evidence discloses that the floor in the store had been waxed twice a week for 10 or 12 years, and that it was last waxed the evening before the morning on which plaintiff fell. Both the manager of the store and the janitor testified that the wax had a tendency to build up and accumulate on the floor to the extent that extraordinary steps were required to remove it. In this connection, the janitor testified that prior to the date of Miss Murphy's fall he had never dewaxed the floor, but that since then from time to time "whenever he had some extra time" he would dewax the floor with hot water with lye in it. The manager testified that the excess wax was removed by scraping, and as best he could remember, the scraping off of the excessive buildup of wax had last been done about two months before the accident. There was likewise testimony and a demonstration by the janitor as to how he applied the wax to the floor and spread it with a hand mop. The jury heard and saw this evidence, and could have found negligence in such method of application. It is not necessary, as defendant suggests, for the plaintiff to have proved a better method of waxing, in order for the jury to be warranted in finding that the method used was negligent.

There was also evidence, before mentioned, that for some 10 or 12 years prior to the fall of Miss Murphy the entire floor in the store had been waxed twice a week. The evidence further showed that sometime after the accident the schedule was

changed so that the entire floor was waxed only once a week and wax applied only to worn spots on the second occasion during the week, and that the place where Miss Murphy fell was not one of the places that received the second application in a week after the change was made. Whether such a post-accident change in method of operation can be considered in the ordinary case in determining negligence as of the time of the accident need not be considered here, because in the circumstances of this case, it was proper for the jury to consider. In the first place, evidence of the change was introduced by the defendant in its case and was received without objection. In the second place, during his argument to the jury, counsel for defendant demanded that counsel for plaintiff point out to the jury in what respects defendant had been negligent in maintaining its floor, and in what way it could improve its maintenance of the floor to make it safer for its patrons. Counsel for plaintiff in answer stated in effect that defendant itself had already discovered its negligence and had itself remedied the situation, pointing to the evidence of the change in the number of waxings of the floor per week. This was evidence which the jury could consider.

Plaintiff testified she had been in the store at least several times a week for years prior to the accident, and that she had never seen the floor as shiny as it was on the day she fell. She testified she was wearing medium, rubber heeled shoes in

good condition and was walking in her normal manner at the time she fell. In this connection it was shown by the evidence that plaintiff was at that time, and for some 30 years, had been a waitress, an occupation which requires some considerable degree of adroitness afoot. This was a circumstance the jury might have considered in determining the cause of her fall.

Then there was the evidence of the fall itself. Plaintiff testified that as she was walking along in a normal manner, her feet shot out in front of her, and she landed on her back and the back of her head with considerable violence. This was corroborated by witnesses for the defendant, clerks in the store, who heard the thud of plaintiff striking the floor at considerable distances away from where she fell. As Judge Pope stated in *Allen vs. Matson Navigation Company*, 255 F 2d 273 at 280:

“Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with the other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, both her feet flew straight out in front of her and up into the air while she fell with a thud upon her back. That is at least some evidence that hers was a slipping fall.”

Likewise in this case, while the mere fact that Miss Murphy fell would be no evidence of why she

fell, the manner in which she fell has considerable significance, and indicates that hers was a slipping fall.

Counsel for defendant points to the lack of evidence in this case that there was a skid mark on the floor, or that there was after the fall wax on the plaintiff's shoes or clothes, such as is found in some slip and fall cases. However, in those cases such evidence merely tends to establish an accumulation of wax on the floor, and that the plaintiff slipped on such wax, and is but one type of evidence establishing those facts. Here there was other types of evidence from which the jury could infer those facts. There is the evidence of the manager and janitor that the wax tends to build up, that the floor had not been dewaxed for two months prior to the plaintiff's fall; that since the accident the number of waxings of the floor at the point of plaintiff's fall had been reduced, and the manner in which plaintiff fell as indicating a slipping fall.

The question of defendant's negligence was for the jury, and in the Court's view there was ample evidence to support the jury's finding on that question, and its verdict will not be disturbed.

Excessiveness of Damages

There is no dispute in the evidence that plaintiff suffered a severe and violent fall with her two feet shooting out from under her, and she landing heavily on her back and the back of her head. There is likewise no dispute in the evidence that

from the time of the accident, at least up to the time of the trial, she had undergone considerable pain and suffering and had been unable to work. There is a conflict in the medical testimony as to the extent and permanency of plaintiff's injuries, but that conflict was for the jury to resolve. There was competent medical testimony which, if believed by the jury, would have supported a verdict much larger than that returned. The Court cannot say that the amount awarded plaintiff is excessive, or is an indication that it was arrived at under the influence of passion and prejudice.

Evidence of Aggravation of Existing
Ailment or Condition

The evidence of the existing arthritic changes in plaintiff's cervical spine was produced by defendant in its case, and plaintiff was entitled to cross-examine with regard to the aggravation of that pre-existing condition. In any event, the allegations of the complaint are broad enough to admit evidence of aggravation of the pre-existing condition, even in plaintiff's case, so there was no error in admitting such evidence under the circumstances here.

Done and dated this 1st day of July, 1959.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed and entered July 1, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Safeway Stores, Inc., a Corporation, the Defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 22nd day of April, 1959.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed July 30, 1959.

In the United States District Court, District of
Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INC.,

Defendant.

TRANSCRIPT OF EVIDENCE

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District

Judge for the District of Montana, sitting with a jury, at Butte, Montana, on April 15, 1959, at 10:00 o'clock a.m. The plaintiff was present in person and represented by her counsel, Mr. Leif Erickson, Helena, Montana, and the defendant was represented by its counsel, Messrs. Robert A. Poore and Urban L. Roth, Butte, Montana.

Thereupon, the following proceedings were had:

The Court: Any ex parte matters? Number 690, Mildred Murphy versus Safeway, are the parties ready?

Mr. Erickson: Plaintiff is ready.

Mr. Poore: The defendant is ready.

The Court: Do you have—

Mr. Erickson: I have two amendments to offer by interlineation in the complaint. In the last line of the first page, which is line 32, insert after the words "constant low back ache" the words "constant pain in the neck and cervical spine"; and in the first line on page 2, after the words "low back" the words "and neck"; and then in Paragraph 4, line 20, substitute for the words "one thousand seven hundred and fifty dollars" the words "three thousand dollars," both in letters and words and in numerals, and I move that the complaint be so amended.

The Court: Any objection?

Mr. Poore: No objection.

The Court: Very well, the amendments are made, call a jury.

(Thereupon, a jury was duly and regularly impaneled and sworn to try this cause.) [2*]

* * *

MILDRED MURPHY

the plaintiff, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you please state your name?

A. Mildred Murphy.

Q. And where do you live, Miss Murphy?

A. 625 North Montana.

Q. And that is in the City of Butte?

A. Yes, it is.

Q. How long have you lived there, Miss Murphy?

A. All my life.

Q. Is that where you were born?

A. Yes. [7]

Q. What is your age now, Miss Murphy?

A. 50 years.

Q. And you are not married? A. No.

Q. And never have been married? A. No.

Q. Who lives with you? A. Right now?

Q. Yes. A. My one brother.

Q. And he is a bachelor? A. Yes.

Q. And until recently did someone else live with you? A. There was another brother.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Mildred Murphy.)

Q. Will you give us the reason he no longer lives there?

A. He passed away in December, very suddenly.

Q. And did your mother live with you there?

A. Yes.

Q. How long, Miss Murphy?

A. Oh, she passed away in '46.

Q. That was the family home? A. Yes.

Q. And your father died quite a few years ago, is that correct? A. In '23. [8]

Q. And during the later years of your mother's life, she lived with you there? A. Yes.

Q. And you took care of her there, is that correct? A. Yes.

Q. You attended schools here in Butte?

A. Yes, I did.

Q. What has been your occupation, Miss Murphy? A. Waitress.

Q. And for how long a period of time?

A. 31 years.

Q. And where did you first start working?

A. Gamers Confectionery.

Q. And how long did you work there?

A. 27½ years.

Q. So for the first 27½ years you worked as a waitress, you had only the one job?

A. Yes, sir.

Q. And did you work steadily?

A. Yes. I did.

Q. What was the reason you left Gamers?

A. Well, at that time they had changed the

(Testimony of Mildred Murphy.)

confectionery to a bakery, and then it was about the fall of the year, business had fallen off, and he was going to work members of the family, so that let me out. [9]

Q. And then did you go on working as a waitress? A. Yes.

Q. Did you go to work immediately?

A. No, that was—I was a little sick that year, I had an operation.

The Court: Speak up so that everyone can hear what you have to say.

A. Right after I got out of Gamers I had an operation.

Q. It wasn't an operation that had anything to do with your present condition, is that correct?

A. No.

Q. Did you recover fully from that?

A. Very well, yes.

Q. After this operation had been completed and you recovered from it, who did you go to work for next? A. Greens Cafe.

Q. And how long did you work there?

A. I worked there for about four months.

Q. And then where did you work?

A. Then I went to work for—when I worked extra, I was at Grands.

Q. Now, when you work extra, what does that mean?

A. Well, maybe a week in that place and maybe a week somewhere else, wherever you want to go or they call you for.

(Testimony of Mildred Murphy.)

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Q. Now, when you work extra, what does that mean?

A. Well, maybe a week in that place and maybe a week somewhere else, wherever you want to go or they call you for.

(Testimony of Mildred Murphy.)

Q. That would be to fill in for girls who were sick or on [10] vacation? A. Yes.

Q. Do some waitresses prefer that kind of work to a steady job? A. Sometimes they do.

Q. After working extra, where did you go to work regularly?

A. Well, after I worked at Greens, then I worked, I told you, at the Fifteen and Grand, and then I went back to Greens again.

Q. Did you work extra there?

A. Yes, and then I worked at Terry's Drivein, and then I worked at the Finlen, and then I went to Jimmy's Doughnut Shop.

Q. How long did you work at Jimmy's Doughnut Shop? A. Two and a half years.

Q. Whereabouts is it located?

A. On the corner—7 West Park Street, Butte.

Q. Now, when did you leave Jimmy's Doughnut Shop?

A. The last part of April, 1958.

Q. 1958? A. Yes.

Q. Did you work at any restaurants after that, before the time of the accident we will discuss later? A. Yes.

Q. Where did you work then? [11]

A. I worked at the Shanty.

Q. Was that extra work?

A. I was working two days a week there, yes.

Q. Had you had any calls to go to work any place else prior to June 24, 1958?

A. Oh, yes, the A.C.M. Club.

(Testimony of Mildred Murphy.)

Q. And had you gone to work there?

A. Yes, I worked there two days before the accident.

Q. And did you have any plans to work there after that?

A. Yes, I was going to work there after that.

Q. Had you been called to work there?

A. Yes, I was told I was going to work there.

Q. On June 24, 1958, did you have a job at that time, on that particular day?

A. Not that day I didn't.

Q. Now, calling your attention to June 24, 1958, you recall that was a Tuesday, do you?

A. Yes.

Q. And did you have occasion to go to the Safeway Store on Granite Street on that day?

A. Yes.

Q. About what time of the day was that?

A. I imagine it was between 10 and 10:30.

Q. Now, did you go down there alone?

A. No. [12]

Q. Who was with you?

A. My brother Frank.

Q. Is he the one that died suddenly in December?

A. He is the one that died.

Q. How did you go to Safeway?

A. In his car.

Q. Where did you park it?

A. On the east side of the Safeway Store on West Granite Street—on East Granite Street, pardon me.

Q. There is a parking lot alongside the east

(Testimony of Mildred Murphy.)

wall of the Safeway Store? A. Yes, there is.

Mr. Erickson: May it please the Court, this is something I should have suggested to the bailiff earlier, but I wonder if I might have the black-board set up?

The Court: Yes, see what you can do.

Q. Miss Murphy, if this is Granite Street coming across here (indicating drawing on board), what is the street to the east of Granite?

A. Wyoming.

Q. Wyoming? A. Yes.

Q. And if Wyoming is over here (indicating) coming down, would the parking lot be in the intersection between Granite and Wyoming? [13]

A. Yes, it would.

Q. And would this line, roughly—there is a sidewalk, of course here (indicating)—represent Safeway Store with relation to Granite Street and the intersection of Wyoming and the parking lot?

A. I think so.

Q. Now, if this is Granite and Wyoming (indicating), and this the parking lot (indicating), would that be a rough representation of about the way it stands? A. Yes.

Q. You will agree it is rough?

A. It is rough.

Q. And I will, too. Now, with relation to the parking lot, whereabouts did you park the car?

A. Right at the corner.

Q. And when you say that corner, would it be roughly like that (indicating)?

(Testimony of Mildred Murphy.)

A. Yes, it would be about the first stall, I guess you would call it, the first parking space.

Q. Now, when you arrived there with the car, what happened to your brother?

A. He got out.

Q. And where did he go?

A. He was going over to Sears to shop.

Q. And Sears is across Granite Street? [14]

A. Just across from Safeway.

Q. And did you see him go over there?

A. No, I got out—yes, I saw him go over.

Q. Be sure to talk loud enough for the jurors, and I'll get away from this position in just a moment.

A. Yes, he got out of the car and he went over to Sears.

Q. Now, when you got out of the car, I think you told me you got out on the right hand side, is that correct? A. Yes.

Q. And you came around the car, is that correct, to get onto Granite? A. Yes.

Q. Can you say whether or not there is a canopy over the street?

A. There is over the sidewalk.

Q. In front of the store? A. Yes.

Q. Now, with relation to the east side of the store, can you say whether or not the door is on the easterly side, that is, the entrance at the front?

A. Yes, it would be closer to the east side.

Q. Now, is that the door you came in?

(Testimony of Mildred Murphy.)

A. Yes.

Q. Now, what was your purpose in going into Safeway Stores? A. To buy groceries. [15]

Q. Can you say whether you regularly traded at that particular Safeway?

A. Oh, yes, I did, I have been in there lots of times.

Q. And is that over a period of years?

A. Yes.

Q. Now, do you know what your brother was going to do?

A. He was going to Sears to shop. He was looking for some tires, pricing tires.

Q. Did you have anything specific in mind that you were going to buy when you went into Safeway?

A. Well, I know I had to buy coffee, that was one thing for sure.

Q. And did you have anything else in mind buying?

A. Meat and other groceries. Usually when you go in you buy more.

Q. And why is that?

A. Because, well, I like shopping over there, and I do a lot of shopping and I look for bargains. You always pick up something more—you always come out with buying more than you intended to.

Q. And is the reason for that the fact that there are displays that you see?

A. Yes, that's right.

Q. They have a system they call advertised specials, isn't that right? [16]

(Testimony of Mildred Murphy.)

A. Yes, that's right.

Q. Now, when you came into the store—when you come into the store, and I realize that from the front this drawing is even worse than I had thought it was going to be, what do you see when you come into the store? Now, I am referring to June 24th, what did you see when you first came into the store?

A. The check stands.

Q. And the check stands are sort of lined up in front of the entryway, isn't that correct, roughly?

A. That's right.

Q. Do you know how many check stands there were?

A. Five.

Q. And in order to get into the store proper, you have to walk in this direction (indicating), isn't that correct?

A. That's the way I walked in, yes.

Q. Well, the check stands would be in your way, so you wouldn't go through—

A. That's right.

Q. Now, is this (indicating) the way you walked when you came in that morning?

A. That's right, that's the way I walked.

Q. Now, the coffee counter was somewhere over around in here (indicating), was it not?

A. Yes.

Q. And was that where you were headed for? [17]

A. I was headed for that place, yes, I was.

Q. Now, in order to get there, can you say

(Testimony of Mildred Murphy.)

whether or not you go by the produce or fresh vegetable and fruit bins?

A. Fruit bin, fruit.

Q. Would that be a rough representation (indicating) of about what you see when you first came in? This is, the fruit and the coffee counter would be down there (indicating), is that about the way it would be?

A. Yes, that's just about right, it's about as close as I can tell you.

Q. And can you say whether or not there is a little rail comes out here (indicating) with the shopping baskets or shopping carts back of it?

A. That's where their baskets are.

Q. Now, when you came into the store, will you go ahead now and tell the jury where you went after you got past the checking stands?

A. Oh, wait a minute—when I went down to the coffee place, is that what you mean?

Q. Yes. Now, this little rough drawing shows you came in the front door and you turned and went to the west between the check stands and the window, and you would come over to a place marked "X." Now, where did you go from there?

A. Well, I walked down past that produce counter, and I was headed for the coffee stand. [18]

Q. Which direction were you walking?

A. I was walking toward the north.

Q. That would be toward the rear of the store?

A. Yes, toward the rear.

Q. Now, that would put you out in here some

(Testimony of Mildred Murphy.)

place (indicating), I am marking that with an arrow? A. Just about.

Q. Is that about it?

A. A little further that way (indicating).

Q. You mean a little further this way (indicating) to the rear? A. Yes.

Q. Now, what, if anything unusual, happened when you reached that point?

A. About that time my two feet shot out in front of me and I fell flat on my back and head.

Q. Now, how were you walking with relation to your speed?

A. Just like I always walk, not too fast.

Q. Say it a little louder.

A. I was just walking the way I always walk.

Q. Was there any occasion for you hurrying that morning?

A. No, I had to wait for my brother. He told me to wait for him there and do my shopping.

Q. So there was no reason for you to walk other than your normal way? [19] A. No.

Q. What kind of shoes were you wearing?

A. Sort of a medium heel shoe, regular walking shoes.

Q. By comparison with the shoes you are now wearing?

A. It is about the same type heel. I mostly wear them for walking.

Q. And would you ladies call that a medium heel? A. That is what I call it, yes.

(Testimony of Mildred Murphy.)

Q. Was that the kind of shoe you were wearing on that day?

A. About the same type only built up a little more.

Q. Which one was built up a little more?

A. The cut comes higher.

Q. The heel would be a little higher?

A. No, this part was built up higher (indicating).

Q. You are now designating the front of the shoe?

A. Yes, the heel was exactly the same.

Q. Is that the kind of shoe you generally wear except for dress-up occasions? A. Yes.

Q. What was the condition of the shoes you were wearing that day?

A. They were in good condition, there was nothing wrong with the shoes.

Q. Your work has been of the kind—

A. I had to have good shoes. [20]

Q. What was the condition of the heels?

A. I had had them fixed Saturday.

Q. And this was on Tuesday?

A. This was on Tuesday.

Q. And what kind of lifts were on the heels?

A. Rubber.

Q. Now, will you—you had not made any purchase at the time?

A. No, I didn't get to where I was going.

Q. Did you observe anything unusual about the appearance of the store when you first came in?

A. On entering the store, yes.

(Testimony of Mildred Murphy.)

Q. What did you see?

A. When I got in, I saw the floors were very shiny and nice and clean and all that, real shiny. Of course, I didn't pay too much attention because that doesn't bother me.

Q. You were in there for the purpose of buying groceries? A. Yes.

Q. But you did observe——

A. It was very shiny and everything looked so nice.

Q. Now, when you say it looked very shiny, would that be the what, floor?

A. Yes, as far as I could see.

Q. Did you observe as you came in whether or not the area where you fell seemed to be shiny like the rest of it? A. Yes, it was shiny. [21]

Q. And you noted that? A. Yes, I did.

Q. And nobody called it to your attention?

A. No, they didn't.

Q. Now, had you ever seen the floor as shiny in your other trips to Safeway in the years before that? A. No, I didn't

Q. And you have traded at Safeway, you say, regularly? A. Yes, I do yet.

Q. Now, with relation to June 24, 1958, the date this fall occurred, when was the last time you had been in the Safeway Store on Granite Street?

A. The Monday before after work.

Q. And when was the last time before that?

A. Saturday.

(Testimony of Mildred Murphy.)

Q. The preceding Saturday. And the last time before that?

A. Oh, I stopped in there Friday on my way home from work.

Q. Can you say whether it was your regular practice to stop in and pick up whatever groceries you needed as you came home from work at the Granite Street Safeway Store?

A. Yes, it was.

Q. The result of that was you were in the store frequently, is that correct?

A. Oh, yes, I have been in there lots.

Q. Where did you do your principal grocery shopping before [22] June 24, 1958?

A. We have always bought down at Safeway.

Q. Can you say whether or not that is the place where you bought the great bulk of your groceries?

A. At the Granite Street store, and once in awhile we would go down to the other one on Front Street.

Q. How would you travel from work to your home on Montana Street prior to June 24, 1958?

A. I would get a ride or go by bus.

Q. And can you say whether or not it was your practice to buy relatively small amounts of groceries at a time, what you could carry?

A. Once in awhile, but not always. I used to get a regular weekly order.

Q. And when you did that—

A. There was still always something you had to buy.

(Testimony of Mildred Murphy.)

Q. You have testified you were in Safeway three times in the preceding days, the day before, and on Saturday and on Friday. Did you at that time, or at any prior time observe that the floor seemed to be slick and shiny as you have testified it was on Tuesday? A. No. I didn't.

Q. Was there any occasion before that there it ever seemed unusual to you at all, that is, the floor? A. No. [23]

Q. Do you recall any experience in the years you traded at Safeway before June 24, 1958, when you ever observed that the floor was particularly shiny? A. I didn't pay much attention.

Q. Did you ever observe any other time when it struck you as being that way?

A. Not so much, no.

Q. And you traded at Safeway for a number of years, I gather, before June 24, 1958?

A. Yes.

Q. And I am referring to the Granite Street Safeway. A. Yes.

Q. Did it occur to you when you went into the store and saw it was slick and shiny that it might be slippery?

A. I didn't pay much attention, you know. What I did, I just went about my business, but I did notice it was really shiny.

Q. When you went into the store, you were headed for the coffee counter as your first stop?

A. Yes.

(Testimony of Mildred Murphy.)

Q. Did you observe any of the displays before you got to the coffee counter, particularly?

A. I noticed some bananas, but didn't stop, just passing by I noticed them.

Q. They were on this fruit counter, is that correct? [24] A. That's right.

Q. Did you have any thought of picking up bananas as you left?

A. They looked awfully good, yes, I would have, probably.

Q. Did you notice any of the other displays or any of the advertising?

A. No, I didn't have time. That was about the time I fell.

Q. Now, coming to the fall, you say that you fell just in front of the fruit and vegetable bin, is that correct?

A. That is what I said, yes, that is about it.

Q. And you were headed in a northerly direction, which was toward the rear of the store?

A. That's right.

Q. You say your feet shot out from under you?

A. Yes, sir, that's right.

Q. Did both of them shoot out from under you?

A. Both feet, yes.

Q. Did you stumble before your feet went out?

A. No, it was a complete surprise.

Q. Were you turning? A. No.

Q. Were you stopping? A. No.

Q. And you were traveling at what—

(Testimony of Mildred Murphy.)

A. Just at the usual speed. I wasn't walking fast, I just [25] walked.

Q. Now, when you landed, which way were you lying with relation to the store?

A. My feet would be up that way (indicating).

Q. When you say that way, toward the rear of the store? A. Yes.

Q. And your head toward the front of the store, is that correct? A. That's right.

Q. And you were laying out in front of the vegetable bins?

A. That's right, fruit bins, I guess it was.

Q. Fruit bins. Now, what was the effect of your fall right then, what happened?

A. Well, I just fell flat on my back and my head hit the floor, and I really heard and felt it.

Q. Can you tell us which part of your body hit the floor first?

A. I am not too sure, I just banged the floor. I was taken by surprise.

Q. Did you have the feeling that your feet shot up in the air?

A. Yes, and I jarred the floor. I was more or less in sort of a daze. I did try to lift my head and I couldn't.

Q. Now, what happened when you fell, what events, if anything took place then? [26]

A. Well, I laid there and I did try to lift my head and I couldn't, and I don't know.

Q. Could you hear any sound?

(Testimony of Mildred Murphy.)

A. I just heard a voice of someone saying, "Why doesn't somebody help her?"

Q. Do you know who that was?

A. What?

Q. Do you know who that was?

A. I can't recall the voice, no, because I was just about—

Q. Were you conscious?

A. Oh, yes; I am sure I didn't lose consciousness. I could hear that voice, but at the same time I don't know if I got helped up or not.

Q. Now, in falling, could you hear any sound as a result of the fall? A. You mean a sound?

Q. Yes, of your body hitting.

A. Yes; I heard my head hit. It really banged on the floor.

Q. Do you know how long you laid there before you got up?

A. I don't think so. I don't think it was very long. I can't remember just exactly the minutes.

Q. And you say you can't remember whether somebody helped you up or you got up by yourself, is that correct?

A. I don't think I could have got up by myself. I don't recall.

Q. Do you know—strike that. Were there other people around [27] in that general vicinity when you fell?

A. Yes; there was employees there when I went in.

(Testimony of Mildred Murphy.)

Q. Did you recognize some of them when you came into the store?

A. Oh, I had known them by sight, yes; I had seen them before, yes.

Q. Did you recognize a girl by the name of Rose Ledingham? A. Yes.

Q. Was she one of the checkers?

A. Yes.

Q. Were there customers in the store that you observed?

A. Probably, around the other side. I just saw a couple or a few.

Q. How many employees did you see when you came into the store, have you any idea?

A. I don't exactly know; I didn't check that.

Q. Now, with relation to the spot where you fell and before you fell, did you observe any people who seemed to be employees of Safeway in that general vicinity?

A. Yes; I saw the manager and some boys.

Q. You saw the manager? A. Yes.

Q. Will you keep your voice up. And is that Mr. Frazer, who sits here? A. Yes. [28]

Q. And you saw who else?

A. Some boys, but I didn't know they—I just saw them. They were working, some clerks.

Q. What were they doing?

A. I suppose putting stuff on shelves.

Q. Now, after the fall, and you have testified you are not sure, you think somebody had to help

(Testimony of Mildred Murphy.)

you up. Do you know who it would have been or was? A. No.

Q. Did you have any conversation with any of the employees of the store immediately after you got up?

A. With Mr. Frazer. He asked me if I was hurt and if I should see the doctor, and I said yes.

Q. And was there anyone else around at that time?

A. This girl that took me to the hospital.

Q. Who was she? A. This Rose.

Q. That's Rose Ledingham? A. Yes, sir.

Q. And you knew her there as an employee for some time, is that correct? A. Yes.

Q. What happened then?

A. She took me to St. James Hospital.

Q. In her car? [29] A. In her car.

Q. Was there any conversation that you heard between Rose Ledingham and Mr. Frazer?

A. No.

Q. Before you left?

A. No; only she said she would take me to the hospital, that is all.

Q. Did you see your brother, Frank, as you left the store?

A. As I was going out, he was coming across the street.

Q. Did he go with you to the hospital?

A. No; his car was there, I don't know what he did.

Q. Now, you say Rose Ledingham took you to

(Testimony of Mildred Murphy.)

St. James Hospital? A. Yes.

Q. Was that immediately after the fall?

A. Yes.

Q. Now, could you observe any injury immediately after the fall was over?

A. Oh, my head hurt terrible as soon as I got up off the floor and I could feel a bump on my head.

Q. Did you feel that with your hand?

A. Yes.

Q. Whereabouts was that?

A. Right here (indicating).

Q. You are placing your hand right on [30] the—— A. Right where the bump was.

Q. The back of your head, is that correct, high up? A. Right there.

Q. And did that swelling appear——

A. Right away.

Q. And how large was it at that time?

A. I would say it was good sized. It felt as big as my hand could cover.

Q. Now, when you got to the hospital, who did you see? Did you see a doctor?

A. Yes; I saw Dr. Rotar; I got him.

Q. And did you see him as soon as you got to the hospital?

A. No; I believe it was one of those nurses and we asked for Dr. Rotar, and then they asked what happened, and the girl that was with me said I had fell at the Safeway Stores.

Q. Is this Rose Ledingham?

(Testimony of Mildred Murphy.)

A. Yes, Rose, and then I got to see the doctor, and he looked at my head and felt and said, "You will have to have an X-ray."

Q. And did you have an X-ray?

A. They put me on a wheel chair and wheeled me down to the X-ray room.

Q. How were you feeling at that time?

A. Very rough. I was just—what would you call it—I was just dazed, I guess. [31]

Q. Did anything else hurt beside your head at that time? A. My neck.

Q. Your head and your neck? A. Yes.

Q. Whereabouts did your neck hurt?

A. Right through here (indicating).

Q. Now, you are designating the lower part of the back of your neck?

A. Right through here, right around this way (indicating).

Q. You are now designating the front of your neck? A. Yes; it hurt all around.

Q. At that time did your lower back hurt?

A. Well, I didn't notice it so much that day. I was worrying so much about my head.

Q. Now, you went to the X-ray room, is that correct? A. Yes.

Q. Did Rose Ledingham come in with you?

A. She waited down there until they took the X-ray.

Q. And X-rays were taken at St. James?

A. St. James Hospital.

Q. Do you know what doctor took the X-rays?

(Testimony of Mildred Murphy.)

A. It was a nurse took them.

Q. Now, how long were you in the X-ray room?

A. I couldn't exactly say how long it was. I waited longer to have the X-rays taken than to take the X-rays. I waited [32] quite awhile to have it taken.

Q. Were you in the wheel chair all this time?

A. Yes; I was on the wheel chair.

Q. And how did you feel then?

A. I felt kind of woozy; I felt like going to sleep.

Q. Did you remain conscious? A. Yes.

Q. After the X-rays were taken, what happened then?

A. Well, they brought me up to the elevator, and about that time my brother came in.

Q. You will have to speak up just a little.

A. About that time my brother came in and Rose was with us, too, still, this girl from Safeway, and she said something about going back to Safeway, and Dr. Rotar said, "No, she"——

Mr. Poore: Just a second, please, to which we object as not responsive to the question and also apparently hearsay testimony.

A. What was that?

Mr. Poore: I was speaking to the Court.

The Court: Sustained.

Mr. Erickson: May I ask one qualifying question?

The Court: Yes.

(Testimony of Mildred Murphy.)

Q. Was Rose Ledingham then working for Safeway Stores? A. Yes.

Q. And she took you down there? [33]

A. Yes.

Mr. Erickson: I do not believe it's hearsay, your Honor. Maybe the answer is not quite responsive.

Mr. Poore: I believe the witness was also testifying to some comment the doctor made.

The Court: Well, ask the question again, will you, counsel?

(Question and answer read back by Reporter.)

The Court: And the objection was with reference to the testimony as to what Dr. Rotar said?

Mr. Poore: Yes, your Honor.

The Court: Yes; sustained; it is hearsay. It is responsive to Rose going back to the Safeway.

Mr. Erickson: Yes.

Q. Now, did you see Dr. Rotar after you came up from the X-ray room?

A. No; I was told to go home and go to bed.

Q. Well, who told you to go home and go to bed?

A. Dr. Rotar.

Q. And you did not go back to Safeway?

A. No.

Q. Did Rose tell you why she wanted you to go back to Safeway? A. No.

Q. And your brother, Frank, was there, is that correct? A. Yes. [34]

Q. Did you go home with him?

(Testimony of Mildred Murphy.)

A. He took me home, yes.

Q. Now, what did you do when you got home?

A. Well, I went to bed.

Q. Did Dr. Rotar give you any prescription?

A. Yes; he did.

Q. And did you have that filled?

A. Not right away; I was taken home first.

Q. And who had it filled, do you know?

A. My brother took it down and had it filled, I

guess.

Q. Now, you say when you got home you went to bed, is that correct? A. Yes.

Q. And how long did you stay in bed?

A. Not very long, I had to get up; I got sick to my stomach.

Q. Speak up just a little.

A. I got sick to my stomach.

Q. You were nauseated? A. Yes.

Q. Did you throw up? A. Yes; I did.

Q. And what about the balance of that day, did you stay in bed all day?

A. Partly. I couldn't stay right down in bed. I would stay as long as I could and then I had to get up. [35]

Q. And did the nausea continue during the day?

A. Yes; it did.

Q. And how long did that last, that condition of vomiting and nausea?

A. Just about all that day.

Q. And with the exception of the time that you

(Testimony of Mildred Murphy.)

had to get up because of the nausea, you stayed in bed all of June 24, 1958, is that correct?

A. Yes; quite a bit because my head hurt so bad.

Q. Now——

Mr. Poore: Excuse me, I didn't hear the answer of the witness.

A. Yes, my head was aching. My head was throbbing, too.

Mr. Poore: Thank you.

Q. Describe how the headache was on June 24, 1958, describe the kind of headache?

A. Just a throbbing all through my head, both back and front, just a throbbing headache.

Q. And what about your neck?

A. That was hurting, too.

Q. Now, how long did you stay in bed after June 24, 1958, if you did?

A. You mean right down flat all the time?

Q. Yes.

A. I kept getting up and down, and—— [36]

Q. And why did you get up?

A. Well, the next day my back hurt so bad, I hurt all over the next day, completely. I hurt clear from the top of my head to my ankles the next day.

Q. And can you say whether or not you got up because it wasn't comfortable in bed?

A. That's right; I wasn't.

Q. Were you comfortable sitting up?

A. For awhile. I just couldn't get in any comfortable place. I would be up for awhile and I hurt, and I would have to lay down for awhile.

(Testimony of Mildred Murphy.)

Q. And how long did that situation continue, when you were up and down?

A. Oh, at least two weeks, 10 days, about two weeks.

Q. Now, what about the headaches?

A. They continued.

Q. And was that a steady condition, the headache? A. At that time, yes.

Q. And did it remain the same kind, as a throbbing headache? A. For that time, yes.

Q. What about this bump on the back of your head; did that get any larger after you got home?

A. No; that started to go down.

Q. And how long did that stay so that you noticed the bump? [37]

A. Oh, about a week or 10 days. It was still sore after the bump went down.

Q. Were you able to sleep?

A. Not too well, no.

Q. Do you know whether or not Dr. Rotar gave you any sleeping pills?

A. He gave me pills for pain.

Q. And did you take those? Your answer is yes?

A. Yes.

Q. You have to answer, not just nod your head. Did you go back to Dr. Rotar's office?

A. Yes; I went back to him the end of that week.

Q. The end of the first week? A. Yes.

Q. And how long were you at Dr. Rotar's office then?

(Testimony of Mildred Murphy.)

A. He had to take some more X-rays.

Q. And of what part of your body were those X-rays taken?

A. The back; the back and the neck.

Q. And with relation to your back, can you say whether it was the whole back or the low back?

A. Yes; the whole back.

Q. And do you know why X-rays were taken, or weren't taken of your whole back on your first visit there?

A. Well, he said I was under shock.

Q. You hadn't complained to him, though, about your lower [38] back on your first visit, had you?

A. No.

Q. And on the second trip you did?

A. I had had to call him up and tell him. My sister called him.

Q. Now, did Dr. Rotar give you any further prescription on your second visit?

A. Yes; he gave me something.

Q. Did you have that prescription filled?

A. Yes.

Q. Now, after the second trip to Dr. Rotar's office, which occurred at the end of the week that had June 24, 1958, in it, did you go back to Dr. Rotar again? A. Yes; the following week.

Q. And can you say whether or not you made regular trips to his office for some time after you were injured? A. Yes; I did.

Q. And how frequent would those trips be?

A. Well, for the first three weeks I went once

(Testimony of Mildred Murphy.)

a week and then about every two weeks and then it dwindled down to about every three weeks.

Q. When was the last you saw Dr. Rotar?

A. About a month ago.

Q. And is he still your doctor?

A. He hasn't dismissed me; he hasn't discharged me. [39]

Q. Now, what treatment, if any, did Dr. Rotar prescribe for you?

A. Just medicine and told me to rest.

Q. Did he suggest hot packs or hot baths?

A. Yes; he told me to take a hot bath, and heat, thinks like that.

Q. Now, have your sleeping habits changed any from what they were before the accident?

A. Oh, yes; I never had any trouble sleeping.

Q. What about now?

A. I sleep about three hours, maybe four.

Q. A night? A. That's about it.

Q. Is that the average amount you get?

A. Yes, and sometimes I don't get that.

Q. And why is it you don't sleep?

A. I don't know, maybe it is my nerves or something, and then my back bothers me and I have headaches.

Q. Do you still have headaches?

A. Yes; I do.

Q. Are they the same kind as they were originally?

A. Well, I don't have that throbbing headache.

Q. Describe what kind they are?

(Testimony of Mildred Murphy.)

A. I have more of a, well, more of a dizzy headache.

Q. How long do they last? [40]

A. Sometimes they last about three days.

Q. And how frequently are you now having them?

A. Sometimes twice a week. Sometimes they don't last three days, sometimes two.

Q. What do you usually do for those headaches?

A. Oh, I take medicine; I take pills; I take a lot of aspirin.

Q. And does that give you any relief?

A. Just temporary.

Q. Now, with relation to your neck, you testified that immediately after the accident it hurt, is that correct? A. Yes; it did.

Q. And you indicated that the portion of the neck that hurt most was down pretty close to where the neck joins the shoulders, is that correct?

A. Yes; right there.

Q. I noticed when you put your hand around the back of your neck, you raised your head up. Do you do that because it gives you some relief?

A. It gives me ease, yes.

Q. And do you do that regularly?

A. Quite a bit.

Q. Is your neck still hurting?

A. Yes; it does.

Q. What about comparing it now with the way it was right [41] after the accident, does it hurt less or more or—

(Testimony of Mildred Murphy.)

A. There hasn't been any change in the neck. That still hurts me just as much, a continual ache.

Q. Not to paraphrase the slang, but does that pain in the neck, is that part of the reason you don't sleep? A. I think so, yes.

Q. Now, what about the rest of your back? Now, calling your attention particularly to your lower back, does that bother you?

A. That's a constant ache.

Q. And whereabouts is that?

A. Just down in the lower part of my back here (indicating), down here.

Q. And you are now indicating the lower part of what we would call the small of the back, is that correct? A. Yes.

Q. Pretty much where your back joins onto your hips? A. Yes.

Q. When did that first start bothering you?

A. Right that next day.

Q. You didn't notice it particularly on the first day?

A. No; I was too upset, I guess; I was more or less in shock. I just didn't think. I was so worried about my head. I was afraid of a crack on the head.

Q. Has that pain in the lower back been continuous since the [42] first day?

A. It has been continuous.

Q. Can you say whether it is better or worse or just about the same?

A. Just about the same, I would say.

Q. Does that have any effect on your sleeping?

(Testimony of Mildred Murphy.)

A. It sure does.

Q. Can you lie or sit in the same position for any length of time?

A. Not very long; no, I can't.

Q. What is the reason for that?

A. Sometimes when I lie down for awhile, it hurts and when I get up and sit down it hurts, and if I walk up and down stairs, it hurts.

Q. Mildred, before your accident, did you have any trouble with your back?

A. No; I didn't.

Q. Had you ever had any trouble at all with your back?

A. You mean a pain in the back or something?

Q. Yes.

A. Oh, a slight pain with a cold or something, but otherwise nothing.

Q. Did you ever have to lay off work because of a back ache?

A. No; I never had to lay off work for [43] anything.

Q. Now, your work as a waitress, referring now particularly to Gamers, the 27½ years you worked there, did you ever have to lay off because of a back ache? A. No.

Q. Or a neck ache? A. No; I didn't.

Q. Did you have headaches before your accident?

A. No; only if I had a head cold or something.

Q. What about taking aspirins, did you take

(Testimony of Mildred Murphy.)

aspirins as a regular thing before your accident?

A. Not too much.

Q. What would they be taken for?

A. Just if I had a cold.

Q. Now, up until the time of your accident, as a part of your regular work, the work of any waitress, you have to carry loaded trays, do you not?

A. Yes; I did.

Q. How tall are you?

A. Five foot two.

Q. And what do you weigh?

A. About 130 pounds.

Q. And did you ever have any trouble carrying loaded trays? A. No.

Q. And sometimes when you are working as a waitress, you don't use trays, but still carry quantities of dishes on your [44] arm?

A. That's right. Most of the places I worked, though, I used a tray.

Q. Did you ever have any trouble carrying dishes? A. No; I did not.

Q. And you observed, of course, over these many years you have been a waitress, did you seem to be able to carry the same loads as any waitress does?

A. Oh, yes.

Q. Would it be possible to hold a job if you couldn't? A. I doubt it.

The Court: I think, counsel, if I may interrupt, I think we may recess at this time. (Jury admonished.) Court will stand in recess until 2:00 o'clock.

(Noon recess.)

(Testimony of Mildred Murphy.)

The Court: You may continue.

Q. Mildred, I believe the last questions I asked you about concerned your carrying trays when you were working as a waitress and you said you didn't have any trouble?

A. No; I didn't have any trouble.

Q. Who takes care of your house where you live?

A. You mean——

Q. Who does the work?

A. I do; the house work, I do that.

Q. And how long have you done the house [45] work?

A. Oh, I have kept house for the last 16, about 16 years.

Q. And is that since the death of your mother?

A. Yes, she is dead 13 years, and she was sick three or four years before that.

Q. And did you keep house in addition to working as a waitress?

A. Yes; I did.

Q. Until the accident on June 24, 1958, were you able to do the house work?

A. Before my accident?

Q. Yes. A. Yes; I was.

Q. And of what did that house work consist?

A. Well, I keep house for myself and my two brothers. I scrub, wash, clean, scrub windows, walls, everything else concerning the house work. I had no trouble doing it.

Q. Did you have a cleaning woman?

A. No.

Q. How large a house is it?

(Testimony of Mildred Murphy.)

A. Seven rooms.

Q. Now, I have observed around the house a yard and garden and flowers.

A. Yes.

Q. Who took care of those?

A. I took care of the flowers, part of it. [46]

Q. And you did that up to the time of the accident?

A. Yes.

Q. Now, since your accident, have you been able to do your regular house work?

A. No; not all of it. I do a little, but not all of it.

Q. What do you do now?

A. I wash the dishes and sweep the floor.

Q. Do you prepare the meals?

A. Sometimes I do.

Q. What about the windows?

A. No. I have tried it, but I just can't do it.

Q. When you say you tried, will you describe what you done as far as washing windows is concerned?

A. I got up on a chair and tried to wash them, but I just couldn't do it. I got all in. I get dizzy, too.

Q. Will you speak up just a little louder?

A. I got so dizzy and my back hurt, and I just couldn't do it.

Q. What about scrubbing?

A. No; I can't scrub.

Q. Now, how do you get that work done now?

A. Well, my sister helps me and my brother

(Testimony of Mildred Murphy.)

does a little and sometimes my neighbor helps me, too.

Q. But you are not able to do it?

A. No; I am not. [47]

Q. You have testified that after the accident you were nervous, is that the case?

A. Yes; I am, and I still am very nervous.

Q. You will have to speak up.

A. I still am very nervous. Yes; I was nervous after the accident, and I still am.

Q. And how do you know you are nervous?

A. Well, I can't sleep the way I should, and crowds bother me; I just don't want to go any place or do anything; I just want to go away by myself; I don't want to see people.

Q. And how were you before the accident?

A. Oh, I wasn't afraid to go any place. I used to go out quite a bit.

Q. And in your work as a waitress, you had to meet people all the time?

A. That's right, crowds never bothered me, people never bothered me, but they do now.

Q. Is that any different now than it was right after the accident?

A. I'm still pretty nervous, I still want to get away and not be around anybody.

Q. You will have to speak up a little.

A. I said I still feel like I want to get away and not be around anybody.

Q. Your sister, Margaret Rosa, has children, has she not? [48]

A. Yes.

(Testimony of Mildred Murphy.)

Q. And prior to the accident could you say whether they were at your house a lot of the time?

A. Quite a bit of the time, usually every day or so.

Q. And did you enjoy them there?

A. Yes; I did, very much.

Q. What is the situation now?

A. Now everything gets on my nerves.

Q. Can you say whether or not you are as cheerful—

A. No; I am afraid I am very cranky and morbid, I guess is what you would call it. I just don't feel like doing anything any more. I just feel awful different.

Q. Now, do you feel in your present condition, having in mind your neck and your headaches and your lower back and your nervousness, do you feel you would be able to go back waiting on tables?

A. No; I don't. I am sure I wouldn't; not for quite awhile. I would have to improve a lot more.

Q. Do you feel you could do it, say, today?

A. No; I know I couldn't.

Q. What education do you have?

A. I have three years high school.

Q. Have you trained for any other type of work at all?

A. No; that was my first job, and I stayed with it.

Q. Can you type or do stenographic work? [49]

A. No; I can't.

Q. Have you ever done sales work?

(Testimony of Mildred Murphy.)

A. No.

Q. Do you have any idea of any other kind of a job besides waiting on table that you could do?

A. Oh, I imagine—I never thought of any other besides waiting on table.

Q. And you have never held any other kind of a job? A. No.

Q. Now, in your complaint, Miss Murphy, you have alleged that prior to the accident your total earnings were \$75 a week. What was the scale paid for waitresses? As I understand in Butte, the waitresses belong to a union, do they not?

A. Yes.

Q. What was the union scale on June 24, 1958?

A. For the week, for five days?

Q. Yes.

A. On a five-day week basis, it was \$38.70, and time and a half for the sixth day.

Q. And time and a half for the sixth day. Was it the practice in Butte at that time to work the sixth day? A. A lot of them did.

Q. What about you on the last job you had?

A. I was working six days. [50]

Q. And what was your scale?

A. That was before the 15th of May last year.

Q. That was under the old scale, is that right?

A. Yes; you got \$44.04 for six days.

Q. And under the new scale, how does that work on a daily basis, Miss Murphy?

A. \$7.74 a day.

(Testimony of Mildred Murphy.)

Q. And for the sixth day, if you worked the sixth day, you would get \$7.74, plus——

A. \$3.87.

Q. Which would make——

A. \$11.61 for the sixth day, which would——

Q. Which would make the total earnings under the new scale in effect at the time of your injury \$55.65, according to my figures. Does that square with yours? A. What was it?

Q. \$55.65—no, I am sorry; that's wrong.

A. It was 50 something.

Q. What is the new weekly scale for five days?

A. \$38.70, plus \$11.61.

Q. Which would be \$50.31, is that correct?

A. That's right.

Q. Do you know whether that scale is still in effect? A. So far, yes.

Q. You worked for a few days prior to your injury as [51] business agent for your union, didn't you? A. Yes; I did.

Q. So you are familiar with the wage scales even though you are not now working, is that correct?

A. That's right.

Q. Now, did you receive any compensation in addition to this basic wage?

A. Yes; we make tips.

Q. And in the jobs you have held, did you get tips in each one of them? A. Yes.

Q. Now, in relation to your work at Gamers, can you tell the jury what your average tips would be in a day?

(Testimony of Mildred Murphy.)

A. Well, I have made an average of \$3 to \$5. Sometimes you went over that, sometimes you went less.

Q. Can you say that is about the average no matter where you work?

A. Well, you can go more than that in a bigger house.

Q. By a bigger house, you mean a hotel or some place like that?

A. Yes, and Gamers was good.

Q. And in some of the places the tips would not run quite that high, quite as high as a hotel, is that correct? A. That's right.

Q. Can you say whether or not it is the fact that the people [52] in Butte generally are generous or not generous tippers? A. Yes; they are.

Q. And is it true that working at Jimmy's you also got tips? A. Yes; I did.

Q. And what would they run down there?

A. Sometimes I would hit three, four, five, sometimes two.

Q. Could you say what the average would be if you picked a figure, three, four, five dollars?

A. I could say five.

Q. Now, in addition to the tips, did you get anything else by way of compensation?

A. Well, we received our board.

Q. How many meals a day?

A. You are entitled to three meals a day.

Q. And did you usually eat three meals at your places of employment?

(Testimony of Mildred Murphy.)

A. Most of the time.

Q. That is breakfast, lunch and dinner, is that correct? Your answer is yes?

A. Yes; pardon me.

Q. Do you know what the value of those meals would be?

A. You mean to me it would be?

Q. Yes.

A. Well, if I had to go out and buy them, it would cost me [53] about \$3 a day, but in a restaurant, it don't cost that much.

Q. So that——

A. That goes in on your salary.

Q. So, your earnings if you worked a five-day week would be \$38.70, plus \$25 a week for tips, plus \$15 a week as the value of the meals, is that about correct?

A. If I had to buy them myself.

Q. And that would total \$78 a week, the way I figured it as the rate of pay you would now expect to be earning if you were working, is that correct?

A. Yes, sir.

Q. And whether it would be more or less than that depends on whether the tips average the \$5 a day, above or below that? A. That's right.

Q. Now, do you know whether there is and has been since June 24, 1958, work available for an experienced waitress like yourself?

A. Well, I have been called for jobs while I have been sick.

(Testimony of Mildred Murphy.)

Q. When you say you have been called for jobs, what does that mean?

A. I have been called on the phone for jobs—what do you mean, for me to—

Q. Yes; to work as a waitress. A. Yes.

Q. Who have those calls come from? [54]

A. Well, I had one come from—you aren't counting that business agent stuff?

Q. No.

A. I have had a call from the A.C.M. Club, I have had a call from the Shanty, and then I got calls from the union at different times.

Q. How many calls from the union, about?

A. Oh, they call on the average of every month or so to see if I was feeling all right and able to work.

Q. Were they calling for the purpose of putting you to work? A. If I could take a job, yes.

Q. Prior to the time of your accident, did you ever have any trouble getting a job? A. No.

Q. Did you ever draw unemployment compensation? A. Once, in '54.

Q. And for how long a period?

A. The full time.

Q. For the full 22 weeks? A. Yes.

Q. Is that the time—

A. I had the operation.

Q. You had the operation and you were convalescing? A. That's right. [55]

Q. Have you drawn any since that time?

A. No—yes; I drew some here last May.

(Testimony of Mildred Murphy.)

Q. Was that before the time——

A. Before the accident.

Q. How many checks did you draw?

A. Oh, not more than four or five at the most.

Q. But with the exception of those two periods, has there been any time you had any trouble getting a job? A. No.

Q. And since the accident you have had a number of calls, do you have any idea how many calls altogether since the accident for work?

A. About 12, 14.

Q. What was the most recent call you had?

A. About a month ago the union called and asked if I was able to work, and wanted to know how I was.

Q. And did you testify this morning that at the time of the accident you had had a call to go to work later for the A.C.M. Club? A. Yes.

Q. When was that job supposed to start?

A. In July.

Q. And was it your hope that that was going to be a permanent job?

A. Well, as long as I could take it, yes. [56]

Q. Comparing your condition now and what it was at the time this complaint was signed, which was on December 10, 1958, that would be approximately five months ago, four months ago, can you say whether your condition is substantially the same, worse, or better?

A. It is not any better. I still have my backache

(Testimony of Mildred Murphy.)

and my headache and my neck, along with my nervous condition.

Mr. Erickson: May I have just a moment, your Honor.

The Court: Indeed.

Q. In your complaint you say that you have had to spend or obligated yourself to pay certain bills for medical and hospital care. Referring now first to Dr. Rotar, who, you say, has been your regular doctor, have you paid Dr. Rotar anything?

A. \$20.00.

Q. And do you still owe him more?

A. Just a little bit, not much.

Q. How much, do you know?

A. I really haven't got another bill.

Q. And you don't know how much that is?

A. Not for sure.

Q. He charges you at the rate of \$3.00 a call, is that correct? A. That's about it.

Q. So up to date the amount you actually paid Dr. Rotar is [57] \$20, and he hasn't billed you for the balance? A. That's right.

Q. When did he last bill you?

A. That's the \$20 bill that I got that I paid.

Q. How long ago was that?

A. About a month ago or two months ago.

Q. Did you receive a bill from Dr. Plett?

A. Yes.

Q. And why did Dr. Plett examine you?

A. Well, right after the accident my ears bothered me; I had a lot of trouble with my ears.

(Testimony of Mildred Murphy.)

Q. Has that cleared up?

A. Yes; that's all right.

Q. And how much did you pay Dr. Plett?

A. \$10.

Q. Now, have you paid the St. James Hospital?

A. No; not yet.

Q. How much do you owe St. James?

A. \$110.

Q. You were also examined by Dr. Clemmons,

were you not? A. Yes.

Q. How many times? A. Twice.

Q. And did he take X-rays?

A. Yes; he did. [58]

Q. And do you know that his statement for his first examination and X-rays is \$160?

A. Yes.

Q. Has that been paid?

A. No; it hasn't.

Q. And you haven't received a bill for this second treatment, is that correct, or this second examination? A. That's right.

Q. So you don't know what that will be?

A. No; I don't.

Q. And he took a number of X-rays, just as was done at St. James? A. Yes.

Q. Do you know what you paid for each X-ray?

A. Where at?

Q. At either place. Is the standard price \$15 per X-ray, do you know that?

A. I think so; I am not sure.

Q. Now, in addition to these items of medical

(Testimony of Mildred Murphy.)

attention, examination and care, have you had any expense for drugs?

A. Yes; I have had some.

Q. And do you know what the total of that is?

A. I didn't keep track of it, I really didn't. I just paid for it as I went along. I didn't keep track of it.

Q. You paid cash? [59] A. Yes.

Q. You had several prescriptions from Dr. Rotar, did you not?

A. About four—yes; I did.

Q. Different kinds of them?

A. Yes; I did.

Q. And did you pay the same amount to the drugstore for each prescription they filled?

A. No; one I had was \$2.50 and one was \$1.50.

Q. Do you know how many of the \$2.50 ones you had? A. Just two.

Q. That prescription was filled twice?

A. It was two different prescriptions, I think.

Q. That cost the \$2.50? A. Yes.

Q. Do you know how many of those \$2.50 prescriptions you had filled altogether?

A. No; I don't.

Q. Can you give us an estimate?

A. No; I can't. I didn't keep track of that.

Q. Well, was it more than one?

A. Maybe about two is all I had of that one.

Q. So that would be \$5 for those two, is that correct? A. Yes.

Q. And the other prescriptions, the ones that

(Testimony of Mildred Murphy.)

cost \$1.50, how [60] many times did you have them filled?

A. I had them, but they were two different prescriptions, a \$1.50 each time.

Q. Were there any other prescriptions besides these three that you referred to?

A. I can't think.

Q. What about other medication?

A. I had a lot of aspirin; I took an awful lot of aspirin.

Q. Do you know what they cost you?

A. I took about eight a day.

Q. About eight a day?

A. Yes. I have no idea what that would come to.

Q. Now, do you expect that you are going to continue to have medical attention?

A. The way I feel now, I am sure——

Mr. Poore: To which we will object as calling for a conclusion of the witness.

The Court: Sustained. I don't believe she is in any position to determine whether she is going to need medical attention, is she?

Mr. Erickson: I'll rephrase the question.

Q. Do you expect to have to go to see Dr. Rotar again? A. I probably will.

Q. What about Dr. Clemmons?

A. Well, he did say—well, no, I am kind of puzzled what to [61] do.

Q. You will have to speak up a little louder.

A. I may. I will take treatments from Dr. Clemmons, I think.

(Testimony of Mildred Murphy.)

Q. And do you have any way yourself of knowing how much money you will probably have to spend for future medical care?

Mr. Poore: To which we object as remote and speculative and calling for a conclusion of the witness.

The Court: Sustained. I don't believe she is in any position to give an estimate of that.

Mr. Erickson: Very well. That is all.

Cross-Examination

By Mr. Poore:

Q. Miss Murphy, as I understand your testimony, you had done a good bit of shopping there at Safeway prior to the happening of your accident on June 24, 1958? A. Yes.

Q. And in fact you shopped largely there and then maybe one other spot, is that right?

A. Yes.

Q. And you went in there nearly every day during all the six days of the week, Monday through Saturday? A. Oh, no.

Q. I guess I misunderstood you. I thought you said on your way home from work you would stop in there and pick something [62] up?

A. That wasn't every day.

Q. Oh. Well, about how frequently during the week would you say you stopped in there?

A. Different weeks, different times, but I had happened to be in there three times the week before I got hurt.

(Testimony of Mildred Murphy.)

Q. Over what period of time had you shopped there at that particular Safeway Store?

A. For years.

Q. It has been there approximately 20 years?

A. I guess it has; I wouldn't know.

Q. A good many years?

A. A good many years I went there. It is practically the only grocery store around that part of town, big one.

Q. And it was used by you primarily in getting your household groceries? A. Yes.

Q. You did the shopping for the family?

A. Yes.

Q. That would be for your two brothers and yourself? A. And myself.

Q. Now, prior to this June 24, '58, did you ever have any difficulty in the store? A. No.

Q. Never had slipped or fallen? [63]

A. No.

Q. Now, would you say that the store, as it existed on that particular day of June 24, '58, was well lighted? A. Yes.

Q. Nicely laid out? A. Yes.

Q. I think you said that it was shiny and nice and clean?

A. It was; it was real shiny and nice and clean.

Q. And I believe you said that you liked shopping over there, referring to the store?

A. Yes; I did.

Q. Was the floor level and smooth, in other words, a flat surface? A. As far as I know.

(Testimony of Mildred Murphy.)

Q. What would you say about the color pattern of the tile, the asphalt tile that was laid there, would you say it was a good color pattern as far as visibility was concerned? A. I think so.

Q. So would it be fair to say, Miss Murphy, that the store, you believe, was well laid out and well planned? A. To my knowledge, sure.

Q. And prior to the particular day in question, would you say that it had been well maintained?

A. What do you mean by that?

Q. Well, the floor in particular, had the floor been well [64] kept?

A. Oh, yes; it was real shiny.

Q. But prior to the particular day, you never had any occasion—you never had slipped or fallen?

A. No.

Q. And this would be over a period of many years and dropping in for your usual shopping for the family? A. Yes.

Q. Now, directing your attention to the particular day in question, I think you said that you went in the store about 10:00 or 10:30 in the morning?

A. Between that time, yes.

Q. And what was the condition of the weather outside? A. It had rained.

Q. Was the outside damp, the outside, the surfaces around the store damp?

A. What do you mean, the sidewalk?

Q. Yes; the sidewalk and parking lot.

A. No.

Q. Well, you say it had rained. The fact is, is

(Testimony of Mildred Murphy.)

it not, that your feet were wet as you came into the store?

A. Well, I just got out of the car, and I didn't walk very much.

Q. No, but isn't it a fact that you walked from the car to the front entrance, and by that time the bottom of your shoes [65] and heels were wet?

A. I don't think so.

Q. You don't believe so. Now, you say that the shoes that you had on on that particular day were, did you say identical or similar to the——

A. Similar to the ones I got on, the same heel.

Q. The same heel. Now, how high would you say that heel is?

A. An inch and a half, would you?

Q. In measuring a lady's heels, am I correct, that you would measure from the bottom where it touches the ground——

A. Yes.

Q. ——up to the inside of the heel, the inside part?

A. I imagine, yes; I think that's about what it is. I never measured it.

Q. Am I correct that this portion of the shoe that I am describing here (indicating), from the instep, from the bottom of the instep down is what would be called the heel of the shoe?

A. That's right.

Q. So then the question that I have asked is approximately how high the heel itself is, is that right?

A. Yes.

Q. And the shoes that you had on on that par-

(Testimony of Mildred Murphy.)

ticular day were approximately or about the same as those there? A. That's right. [66]

Q. And would you mind if I measured them?

A. No.

Mr. Poore: I have got a pretty fancy ruler somewhere.

The Court: If you can find it.

Mr. Poore: If I can find it.

Q. You are a pretty good guesser. Would you say that would be an eighth of an inch less than two inches, in other words, one and seven-eighths inches tall, or long, this little mark right here (indicating)? A. It is almost two inches.

Mr. Poore: Do you want to take a look at it, Mr. Erickson?

A. It is almost two inches.

Q. Yes; practically two inches, an eighth of an inch less than two inches. Do you remember what sort of dress you had on that day, Miss Murphy?

A. What?

Q. What color dress? A. Black.

Q. A black dress. And when did you first notice as you came into the store there that the floor seemed shiny to you?

A. After I got through that—where they used to have the gate, the turnstile—

Q. The turnstile.

A. But that was open, there wasn't one there, and as I got [67] in there, that's where I noticed that it was quite shiny.

Q. Now, referring to Mr. Erickson's diagram,

(Testimony of Mildred Murphy.)

and pointing to what I understand is the entrance to the store, where would you say the turnstile was? Would you mind coming down and making a dot where the turnstile was?

A. Let me see, well, you get past, right about there, past the check stands.

Mr. Erickson: A little louder.

Q. I see, about level with the check stand.

A. A little past that.

Q. The floor prior to that, between there and the door, there is also this linoleum tile, is there not? A. I didn't notice.

Q. So that it wasn't until after you got past the check stand, where I made a little circled "1," that you noticed how shiny it was? A. Yes.

Mr. Erickson: Mr. Poore, would you mind swinging that so the jury could see?

Mr. Poore: Yes.

Q. And then from there to the place that you fell, how far would you say that was, Miss Murphy?

A. In distance?

Q. Yes.

A. Oh, could I diagram from about here to those chairs, like [68] that? Could I say it that way?

Q. Sure. A. I am not sure.

Q. A distance from about where you are to the chairs, referring to the chairs in the courtroom?

A. I judge it that way. It might not be quite that far.

Q. Eight full paces, or about 24 feet?

A. It could be.

(Testimony of Mildred Murphy.)

Q. Would that be approximately right? Would that be approximately the distance from where you first noticed it to be shiny to the place where you fell? A. I think that's about it.

Q. Now, in that distance did you change your gait in any way, change the way you were walking?

A. No.

Q. You didn't slow down?

A. I wasn't walking fast to start with.

Q. You didn't stop? A. No.

Q. You didn't actually inspect the floor?

A. No.

Q. Did you rub your foot on the floor to see if it was actually slippery?

A. I didn't think of that.

Q. In any event, you didn't do it? [69]

A. No.

Q. And after walking approximately that distance is when you slipped and fell?

A. Well, my two feet were just taken, just shot out in front of me.

Q. Now, after you slipped and fell, I believe you said that a girl or young lady or woman named Rose took you to the hospital?

A. That's right.

Q. And how did you go down there, in what kind of a conveyance? A. In her car.

Q. In her car. Now, on the way down there, do you recall telling this girl, Rose, that you believed you slipped and fell because your shoes were wet and were slippery?

(Testimony of Mildred Murphy.)

A. No; I didn't converse with Rose at all.

Q. So you would say that you did not have any such conversation as that? A. No; I didn't.

Q. After you got down to the hospital, you were treated by Dr. Rotar, is that correct?

A. Well, he examined my head, and he said I would have to have an X-ray, and that was where I was worried about was my head.

Q. Now, am I correct in this that you had walked out of the [70] store from where you had fallen to Rose's car? A. Yes.

Q. And you rode down to the hospital?

A. Yes.

Q. Did you walk into the hospital?

A. With Rose, yes.

Q. And then when you left, how did you get home again?

A. My brother brought me home.

Q. Did you walk from the hospital out to your brother's car? A. Yes.

Q. Then, as I understand it, you were treated by Dr. Rotar over a period of time, and his bill to you was \$20?

A. So far, but I am sure I owe him more.

Q. And he saw you approximately a month ago?

A. Yes.

Q. Now, what again was the nature of Dr. Rotar's treatment of you, Miss Murphy?

A. Well, he gave me medications, pills.

Q. Those are the same pills that you had filled, two prescriptions of each? A. Yes.

(Testimony of Mildred Murphy.)

Q. And other than that, I believe you mentioned heat, did you not? A. Yes. [71]

Q. Was there any other prescription or was there any other treatment by Dr. Rotar?

A. Well, later on he told me to take hot baths.

Q. And other than hot baths and pill prescriptions, I believe—— A. And rest.

Q. And rest. Was there anything else that Dr. Rotar prescribed? A. No.

Q. Were you ever hospitalized?

A. For this accident?

Q. Yes. A. No.

Q. You never had any casts on? A. No.

Q. Never had a special garment prescribed for you? A. No.

Q. Never had a board to be put in your bed or anything like that? A. No; I didn't.

Q. No physical therapy? A. No.

Q. And you never had to go down to the Civic Center to take any kind of therapy there?

A. No; I didn't.

Q. Or to the Community Hospital? [72]

A. No.

Q. Now, during this period of treatment by Dr. Rotar, how did the treatment change?

A. What do you mean by that?

Q. Well, it started out, as I understand, maybe I have this wrong, it started out with some pills and rest and heat, and was that ever changed, or was that the constant treatment he prescribed?

A. That's it.

(Testimony of Mildred Murphy.)

Q. Did he ever prescribe any exercises?

A. Once he told me to try exercises.

Q. And what particular exercise did he ask you to try?

A. Just to bend my back, stand up against the wall and bend my back. I couldn't do it.

Q. And did you advise him you couldn't do it?

A. I think I did.

Q. Did he show you how you were to do it?

A. No, he just told me.

Q. Did you show him how you were doing it?

A. No.

Q. And after you advised him that you just couldn't do it, he didn't explain it to you further?

A. No.

Q. Now, these times that you went down to see Dr. Rotar, that was at his office at the St. James Hospital? [73]

A. Yes.

Q. And you rode down in your brother's car?

A. That's right.

Q. The first few days you were home after the accident, apparently you were sick to your stomach, and it was necessary for you to get up quite frequently?

A. Yes, it was.

Q. Were you ever attended by anybody other than members of your family at home?

A. To stay with me?

Q. Yes.

A. Other than neighbors to come in once in awhile.

(Testimony of Mildred Murphy.)

Q. Now, when was it that Dr. Plett treated you, Miss Murphy, approximately?

A. In November.

Q. November of '58. A. Yes.

Q. And I believe you said there was a bill from Dr. Clemmons.

A. Did you say Dr. Plett or Clemmons?

Q. Excuse me, I am sorry. Jumping around that way is a little bit confusing. You had seen Dr. Plett in November?

A. No, no, Plett was in July, right after the accident.

Q. That was shortly after the accident itself?

A. Yes.

Q. And he charged you \$10 for his [74] treatment? A. Yes.

Q. You were referred to a bill that Dr. Clemmons made out or rendered to you. Did you ever receive that bill? A. Yes.

Q. Do you have it with you? A. No.

Q. Do you know how much it was of your own knowledge? A. \$160.

Q. And did Dr. Clemmons ever treat you himself? A. No.

Q. You have never received any treatment from Dr. Clemmons? A. No.

Q. I believe you stated that before the accident, Miss Murphy, you were taking jobs here and there around town, is that accurate? A. Yes.

Q. You had finished your regular job at Jimmy's late in April, was that your testimony?

(Testimony of Mildred Murphy.)

A. That's right.

Q. And since the accident, why you have had some calls to go to work? A. Yes.

Q. Wouldn't you say, also, though, Miss Murphy, that since the time of the accident, namely, last June, that the conditions have been pretty tough in Butte, economic conditions? [75]

A. Well, I have always been able to get a job no matter how tough they have been in the past.

Q. Haven't a good many restaurants closed up in that time? A. Quite a few have.

Q. For example, Nadine's down there on Galena and Main Street, that closed up about that time, didn't it?

A. Well, I have never before found any trouble to get a job, and I have had calls since.

Q. All right, but I was calling your attention to that particular restaurant. How about the Chatter-box on Utah, didn't that fold up about July?

A. I don't pay any attention to those places.

Q. And the Patio on East Park Street, that is a restaurant that closed last fall, didn't it?

A. I don't know.

Q. You were working there for the Women's Protective Union in regards to waitresses' jobs?

A. Yes, but I was just working extra at that time for the business agent.

Q. And the Five Mile, I believe they folded up about in December, that's a restaurant out on the Flat. Didn't Ken's Cafe out on East Park Street close, and Sandy's on Park and Montana that used

(Testimony of Mildred Murphy.)

to be the old Bee Hive across from old Gamers close up last fall? A. Yes. [76]

Q. Each one of those employed waitresses, did they not? A. Yes, a few.

Q. The Shamrock Cafe? A. That didn't.

Q. The only—in other words, isn't it accurate—

Mr. Erickson: May I have an objection? I don't believe the last question was answered, and the new question assumes something that—

Q. Excuse me, what was the last answer to my last question, would you read it to me, please, Mr. Parker?

(Question and answer read back by Reporter.)

Q. The Shamrock Cafe down on South Main and Galena.

The Court: I think she said that didn't employ waitresses, isn't that what your answer was?

A. Yes.

Q. (By Mr. Poore): Miss Murphy, wouldn't it be fair to say with these cafes closing and the general economic conditions this last few months, this last year or so has been unusual and difficult?

A. Being an old member of the union, I get the preference, I get the call.

Q. I see. I didn't understand quite on your figures that your tips would run around 3 to \$5 a day, and then I believe Mr. Erickson asked what you

(Testimony of Mildred Murphy.)

thought they would average, and your answer was \$5. I just got mixed up on it. How did you [77] arrive at that figure?

A. Because sometimes you make more.

Q. I see, in other words, other than being an average of 3 to \$5 a day, it would be 3 to something greater than 5, is that it?

A. Well, I don't understand that question.

Q. Well, what would you say your tips averaged during this period of time Mr. Erickson was referring to?

A. About \$5 a day.

Q. And what would be the extremes, \$3 would be the low figure, apparently, and what would be the high one?

A. You could get 7 or 8.

Q. I see.

A. Depending on where you worked.

Q. So that the average would be about 5?

A. Yes.

Q. Now, on the question of the board, I believe you said you received three meals a day there?

A. That's what we are entitled to.

Q. And what did you say those were worth to you?

A. Well, if you had to buy it outside, you would have to pay at least a dollar for each meal, don't you think so?

Q. Yes. What I was trying to get at though was whether you were basing the value of the meals on what the people that would come into the restaurant would have to pay? [78]

A. Well, that's what I figured the question was.

(Testimony of Mildred Murphy.)

Q. And, of course, since that time you have been paying for your meals at home, isn't that right?

A. That's right.

Q. And would you say that the same scale would apply, would you still say that your meals at home cost about a dollar each, or more?

A. Oh, no, I don't think so.

Q. As to the accident itself, now, getting your mind back again, Miss Murphy, you didn't notice any spots or discoloration or anything on your dress after the fall?

A. I didn't pay any attention to it.

Q. In any event, you didn't notice anything?

A. No, all I wanted to do was get out of Safeway, it was an embarrassing thing to fall.

Q. Did Dr. Rotar prescribe the aspirin for you?

A. He told me to take it, yes.

Q. And did you ever take any liniment or anything like that? A. Rub it on?

Q. Pardon me? A. You mean liniment?

Q. Yes. A. Yes, sort of a heat.

Q. Did you ever apply any of that?

A. Yes. [79]

Q. And did Dr. Rotar prescribe that?

A. No, that was my own idea.

Q. That was your own? A. Yes.

Mr. Poore: I believe that's all.

(Testimony of Mildred Murphy.)

Redirect Examination

By Mr. Erickson:

Q. Just one or two questions. Miss Murphy, Mr. Poore asked you to estimate the distance in feet from the place where you fell to the spot where you first noticed the shininess, and I think your testimony was you first noticed it when you first went through the turnstile that is open, is that correct?

A. Yes, that's when I noticed it.

Q. And I think you said that the place where there had been a turnstile or was a turnstile was beyond the rail back of which the carts were parked, is that correct? A. Yes.

Q. So that whatever the distance is between that point and the point where you fell is the distance where you first noticed the shininess, is that correct? A. Yes.

Q. And you didn't make any measurements?

A. No, I don't know, I am just guessing as to the distance.

Q. Now, the question was asked you about whether your shoes [80] might have been wet and you testified this morning that when the car was parked, it was parked right by the the extreme southeast corner of the Safeway Store, is that correct? A. That's right.

Q. And you also testified that there was a canopy over the sidewalk? A. Yes.

Q. And can you say whether or not the canopy

(Testimony of Mildred Murphy.)

extends right up to the edge of the building, that is, the east edge? A. Yes.

Q. And the canopy that is there now is the same one that was there on that date? A. Yes, it is.

Q. And you testified that you walked around the car and came under the canopy. Was it raining at that time? A. Not at the time.

Q. Did you have an umbrella? A. No.

Q. Were you wearing a hat? A. No.

Q. Now you and I drove by Safeway Store this morning, did we not? A. Yes.

Q. And did you observe whether or not there was gravel where your car was parked, and around in back of it? [81] A. There was.

Q. Can you say whether or not that was the same circumstances when you——

A. Yes, there was gravel.

Q. And is it your testimony now that your shoes were not wet?

A. Well, I don't see how they could be.

Q. Now, the question was asked you concerning whether you said to Rose Ledingham that you fell because your shoes were wet, and you say there was no such conversation?

A. There was no conversation. I didn't feel like talking.

Q. Were you conscious? A. Yes.

Q. So, if you had said it, you would remember it? A. I would remember.

Mr. Erickson: That is all.

The Court: Anything further, Mr. Poore?

(Testimony of Mildred Murphy.)

Mr. Poore: May I just take a minute, your Honor?

The Court: Yes. Well, let's take a recess until 3 o'clock. (Jury admonished.) Court will stand in recess until 3 o'clock.

(10-minute recess.)

Mr. Erickson: I find that in the recess I thought of a question or two, your Honor, also.

The Court: Very well.

Q. (By Mr. Erickson): You were asked by Mr. Poore about [82] whether you said something to Rose Ledingham to the effect that your shoes were wet, and you say there was no such conversation. Do you recall what the conversation was in the car, if any?

A. She just said, "What hospital do you want to go to," and I said, "St. James."

Q. Now, you said at St. James she said you should go back to Safeway, and you did not go back. Was there any other conversation in the hospital?

A. She said to me that Safeway went good for this.

Q. What was she referring to?

A. I guess the expenses.

Q. But those bills have not been paid for?

A. No.

Q. You paid Dr. Rotar? A. Yes.

Q. And the hospital bill is still due?

A. Still due.

Mr. Erickson: That is all.

(Testimony of Mildred Murphy.)

Recross-Examination

By Mr. Poore:

Q. May I ask you if we can measure the bottom of your heel, too, on this, Ma'am? Would you mind stepping over here, too, Mr. Erickson, to see if I got this right. Your heel slopes [83] down to approximately five-eighths of an inch, is that roughly accurate?

A. I don't know, I never measured it.

Mr. Erickson: Shall we make it three-quarters?

Mr. Poore: All right, fair enough, three-quarters.

Q. And it is roughly round?

A. I guess so.

Mr. Poore: That is all.

Mr. Erickson: That is all.

The Court: You may step down, call the next witness.

(Witness excused.)

DR. HOWARD M. CLEMMONS

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Please state your name, Doctor?

A. Howard M. Clemmons.

Q. What is your profession, Doctor?

(Testimony of Dr. Howard M. Clemmons.)

A. Orthopedic surgery.

Q. And where do you practice?

A. In Butte, Montana.

Q. And how long have you practiced here?

A. Since 1951. [84]

Q. Now, what does being an orthopedic surgeon involve?

A. The requirements are graduation from a medical—

Q. May I interrupt? What is the specialty, orthopedic surgeon, what does that mean?

A. Well, it is referred to as that branch of the healing art which deals with diseases, deformities, injuries of bones and joints and associated structures, and those associated structures are the muscles, ligaments, tendons, nerves, blood vessels, and so forth.

Q. And those are the muscles, nerves, ligaments that are attached to the bony skeleton, the bony part of the body, is that it, in general?

A. Well, associated with the bony skeleton, yes.

Q. And your practice is limited to and you specialize in that particular field of medicine, is that correct?

A. That's correct.

Q. Now, will you tell the Court and jury, doctor, what your training has been and your qualifications for specializing in that field?

A. The Board of Standardization requires graduation from a medical school approved by the American Medical Association, followed by an internship in a hospital approved by the Council on Postgradu-

(Testimony of Dr. Howard M. Clemmons.)

ate Medical Education of the American Medical Association, and following that, a minimum of three years of postgraduate training in orthopedic surgery. I had [85] four years postgraduate training. One year was spent with three orthopedic surgeons in Omaha, Nebraska. Following that I served a fellowship at the Guthrie Clinic and Robert Packer Hospital in Sayre, Pennsylvania, of a year and a half, and following that a fellowship in orthopedic surgery at the Leahy Clinic and affiliated hospitals in Boston, Massachusetts. After completion of one year of postgraduate training, we were then eligible for examination in what they call part one of the Boards, which I completed in New York City, in May, 1948. After the completion of the academic training in the aforementioned institutions, and upon completion of two years practice in the specialty field, the applicant is then eligible for the part two examination, which are given in Chicago, which I took on January 23, 1954, and the examining board is composed of specialists in the field of orthopedic surgery who are professors and teachers in teaching institutions and various colleges in the United States.

Q. And did you take that examination and successfully pass it?

A. That's correct, and they issue you a certificate showing that you are then certified by the specialty board as eligible to call yourself a practitioner in that field.

Q. In the field of orthopedic surgery?

(Testimony of Dr. Howard M. Clemmons.)

A. That's correct.

Q. And do you belong to any organizations or societies limited [86] to orthopedic surgeons?

A. Yes, sir, after the board examinations are completed and the candidate is successfully certified, he then is eligible for fellowship in the American Academy of Orthopedic Surgeons.

Q. And are you a member of that?

A. That's correct, and also a member of the Western Orthopedic Association.

Q. How long have you practiced here in Butte, Doctor? A. Since 1951.

Q. And I believe we didn't get the name of the college or university or medical school from which you secured your original M.D.

A. The University of Nebraska College of Medicine located at Omaha, Nebraska.

Q. Do you have other academic degrees besides the M.D.?

A. A Bachelor's Degree from the University of Omaha.

Q. Now, how long have you practiced in Butte?

A. Since January, 1951.

Q. And has your practice been limited to orthopedic surgery? A. Yes, sir.

Q. And as an orthopedic surgeon, do you perform operations, surgery in your field?

A. That is correct.

Q. And in addition to your practice here in Butte, do you [87] also serve in some capacity in connection with a hospital in Helena?

(Testimony of Dr. Howard M. Clemmons.)

A. All the staff affiliations, you mean?

Q. Yes.

A. I am on the staff of St. Johns Hospital in Helena, St. Peters Hospital in Helena, and Shodair Hospital in Helena.

Q. And you are on the staff at St. James here?

A. Yes, sir.

Q. And any other hospital?

A. St. James and Community Hospital here.

Q. And the Shodair Hospital at Helena is the hospital for crippled children, is that correct?

A. That is correct.

Q. And do you do the orthopedic surgery at that hospital?

A. I am one of the orthopedic surgeons at the hospital, yes.

Q. And your experience has been extensive since 1951, or not, as an orthopedic surgeon in Butte and the surrounding territory, and particularly in Butte and Helena?

A. I have limited my practice to orthopedic surgery.

Q. Now, were you asked by me to examine Miss Mildred Murphy, the plaintiff in this action?

A. Yes, sir.

Q. And did you make an examination of Miss Murphy? A. I did. [88]

Q. Now, before you tell us about that examination, Doctor, will you give to the Court and jury an idea of what your procedure is when you examine a

(Testimony of Dr. Howard M. Clemmons.)

person in some manner connected with orthopedic surgery or diagnosis?

Mr. Poore: If the Court please, prior to getting into this phase of his testimony could we ask a question or two on the qualifications of the doctor?

Mr. Erickson: Yes, I have no objection, your Honor.

The Court: Proceed.

Mr. Poore: Doctor, did you ever prescribe for or treat Miss Murphy?

The Court: Well, that doesn't have anything to do with his qualifications as an expert, does it?

Mr. Poore: I believe it does, your Honor.

The Court: Well, I don't understand that it does. Do you object to the question?

Mr. Erickson: I do.

The Court: Sustained.

Mr. Poore: We will reserve the questions until cross-examination.

The Court: Of course, it may have something to do with reference to the kind of testimony that he can give. In other words, a treating doctor is at liberty to testify to things other than an examining doctor for the purpose of testifying. [89]

Mr. Poore: Then may we renew the examination along those lines?

Mr. Erickson: I haven't asked him any questions yet.

The Court: No, you haven't, you are just offering him as an expert?

Mr. Erickson: That's right.

(Testimony of Dr. Howard M. Clemmons.)

The Court: Very well, go ahead. You can make an objection based upon the fact that he has never treated her, that he has just examined her as a doctor examining her for the purposes of testifying.

Mr. Poore: May that be stipulated that the doctor has never examined her for the purposes of treatment, but merely for the purpose of testifying?

Mr. Erickson: I am not sure, never having asked the doctor the question. He has examined her once since the original examination, and I don't know. Anyway, Mr. Poore is so co-operative and I don't like to see him unco-operative, your Honor, but I don't believe the question is proper at this point.

The Court: At this point. Continue, sustained, go ahead.

Q. (By Mr. Erickson): Now, the last question was your general procedures that you use when you are examining a person referred to you for an orthopedic examination?

The Court: May I suggest that he not list the procedures that are generally used. Let's have him just list the procedures [90] that were used in this case, because then we will have to go through that all over again.

Mr. Erickson: Very well, your Honor.

Q. Now, did you examine Miss Mildred Murphy?

A. Yes, sir.

Q. Have you the report of your examination there? A. Yes, sir.

Mr. Erickson: And the copy of that report, your

(Testimony of Dr. Howard M. Clemmons.)

Honor, has been delivered or served upon counsel, so that the report has been made available.

Q. The report is dated November 26, 1958?

A. That's correct.

Q. What date did you examine Miss Murphy?

A. On November 14, 1958.

Q. And the report that you now hold in your hand was the report given to me, is that correct, was that the result of your examination?

A. This is a copy of that report, yes, sir.

Q. And how soon after the examination was the report prepared? A. Within 24 hours.

Q. And does the preparation of this report follow your general practice? A. That's correct.

Q. In reducing your memoranda or your notes to writing in [91] the form of a report?

A. I should say that is the time I dictate the report. The date on here is the date my secretary transcribes the report and sends it out.

Q. And when you make your original examination, in this case, for example, the examination was on November 14th, but you would not have available on that date the entire results of your tests, is that correct? A. That is correct.

Q. And your X-rays?

A. That's right, the X-rays are not dry.

Q. Now, if you will refer to your report, will you give the jury the history that was given you by Miss Murphy at the time she came in for examination?

A. She told me that she had slipped on a slippery floor in the Safeway Store on East Granite Street

(Testimony of Dr. Howard M. Clemmons.)

on the 24th of June, 1958, about 10:30 in the morning.

Mr. Poore: Now, if it please the Court, we object to this line of testimony upon the ground and for the reasons that the doctor is not the attending or treating physician, and that as such this is a declaration of self-serving heresay declarations and is inadmissible.

The Court: Sustained.

Mr. Erickson: May it please the Court, I hope the Court will reserve ruling on it. I have a case and I have it with me, [92] but I have been trying to find it in which the appellate court has ruled that for the purpose of showing the basis for the doctor's examination and the background, and I believe it is the universal rule, this history may be given. However, the jury should be admonished, and I haven't prepared an instruction on it, but I will do it, that that history is not any proof of whether the accident occurred or did not occur, but I believe the rule, your Honor, is that——

The Court: Well, give me the authority. I will have to rule on it now, I can't take any time with it. I'll take a look.

Mr. Erickson: I don't believe I can find it immediately, your Honor, and I would hope that I may be permitted to submit the authority later.

The Court: And reopen the question, but in the meantime I will have to sustain the objection.

Q. Will you turn now to your section of your report, Doctor, entitled "Examination," and will

(Testimony of Dr. Howard M. Clemmons.)

you tell about the actual examination of Miss Murphy?

A. The examination revealed tenderness to palpation, that is, to touching and feeling, along the base of the skull, and of the long strap muscles at the back of the neck. Motions of the neck were diminished about 50 per cent normal in lateral or sideward bending, each left and right, and in rotation, which is when they swing the chin to either side. Forward [93] and backward motions of the neck were normal. There was some tenderness, however, in the extremes of both flexion, that is the forward bending and backward bending of the neck.

Q. Now, when you say that, are you referring to the motion of which she is capable in the extremes of 50 per cent, is that what you are referring to there?

A. That is correct. Now, there was tenderness to touching and feeling two of the muscles, one of which is called the splenius capitis and the other the trapezius. They are muscles located at the back and side of the neck. I will merely relate the positive findings.

Q. Now, when you refer to a positive finding in medical terminology, if you find nothing unusual, that's a negative?

A. That's normal or negative. Positive findings mean abnormality.

Mr. Poore: Prior to the doctor's answering this question, may we ask a question directed to the

(Testimony of Dr. Howard M. Clemmons.)

foundation for this particular question, this line of testimony?

The Court: No; if you have an objection to him testifying, why make it.

Mr. Poore: We object to further testimony from the witness upon the ground and for the reason that no proper foundation has been laid, and it appears that the doctor is not the attending or treating physician, and in testifying as to subjective symptoms, he is basing his opinion upon [94] self-serving hearsay declarations by this particular plaintiff to the doctor.

The Court: Well, it doesn't appear that he is making answers based upon the self-serving declarations—are these findings made upon your observations of the movements that could be made and can be made?

A. Yes, sir.

The Court: It didn't depend upon what she told you?

A. No, sir.

The Court: It just depended upon your examination and manipulation and what you could observe?

A. That's correct, your Honor.

The Court: Proceed.

A. Motions of the lumbar spine, that's the lower portion of the spine, were limited to about 25 per cent of normal in sideward bending, that is each left and right, and on forward bending. There was tightness and rigidity of one of the strap muscles

(Testimony of Dr. Howard M. Clemmons.)

of the back. Those are muscles that parallel the spine up and down and lie on either side of the center of the spine.

Q. How could you tell there was rigidity?

A. By touching it and feeling it. There was an increase in what is known as lumbar lordosis, or more commonly as swayback. Everybody has some swayback within normal limits, but hers was markedly increased. The straight leg raising [95] test which is performed with the patient lying on the back and the knees straight, the examiner lifts the leg this way (indicating). The test is known simply as the straight leg raising test, and it caused discomfort in the lumbosacral area. However, there was no evidence of sciatica or sciatic nerve involvement.

Q. Now, did you make an X-ray examination of Miss Murphy? A. Yes, sir.

Q. Will you go ahead and tell us about that?

A. Well, the report of the X-ray examination is on the written report. Front and side views of the skull were taken and showed no abnormality. Front and side views of the neck, cervical spine, were made and showed a decrease in the joint space between the fifth and sixth cervical vertebra.

Q. Do you have with you, Dr. Clemmons, the X-ray or X-rays that were taken of the skull and of the cervical spine? A. Yes, sir.

Q. You have those convenient there?

A. Yes, sir.

The Court: You may have those marked.

(Testimony of Dr. Howard M. Clemmons.)

The Witness: The skull didn't show anything. It is normal—my X-ray for that shows.

Q. You testified that in addition to X-rays of the skull you also took X-rays of the cervical spine, is that correct? A. That's correct. [96]

Q. And the cervical spine is that portion of the spine of the upper end of it, isn't that true?

A. That's right, from the bottom of the skull to the area between the shoulders. The neck is the cervical spine.

Q. And you have two X-rays, or one X-ray taken of Miss Murphy on November 14, 1958, is that correct? A. That's correct.

Q. One?

A. Well, this one shows the pathology.

Q. Very well.

Mr. Erickson: May we have this X-ray marked as Plaintiff's proposed exhibit No. 1?

Q. Dr. Clemmons, showing you the X-ray which has been marked Plaintiff's proposed Exhibit 1, is that an X-ray picture taken on November 14, 1958, of Mildred Murphy? A. It is.

Q. And is that a part of your regular files?

A. Yes, sir.

Q. That are kept in connection with the examination of Miss Murphy?

A. That's correct.

Q. And the X-rays were taken in your office?

A. That's right.

Q. And did you see the X-ray immediately after it was developed and processed? [97]

(Testimony of Dr. Howard M. Clemmons.)

A. Yes, sir.

Q. Now, if you will——

Mr. Erickson: I believe I will offer the X-ray at this point, your Honor.

Mr. Poore: May we ask the witness a question?

Mr. Erickson: Yes.

Mr. Poore: Does this truly and accurately portray the area of Miss Murphy's body it is intended to portray?

A. Yes, sir.

Mr. Poore: No objection.

The Court: What is it, No. 1?

Mr. Erickson: Yes.

The Court: It is admitted.

(Plaintiff's Exhibit 1 here received in evidence.)

Q. (By Mr. Erickson): Now, Doctor, I wonder is there another one taken of the cervical spine at the same time?

A. There is another view taken at the same time.

Q. It shows nothing significant as far as the examination is concerned?

A. No, sir.

Q. Now, Doctor, I wonder if you would use your gadget here and explain to the Court and jury what that X-ray shows?

Mr. Poore: If the Court please, we will renew our objection to the admission of this testimony unless by proper foundation it is shown that this opinion of what is shown by [98] this X-ray is not

(Testimony of Dr. Howard M. Clemmons.)

based in whole or in part upon any testimony given to the doctor by Miss Murphy.

The Court: Well, Doctor, you are limited to pointing out what the picture shows.

A. Yes, sir.

The Court: Proceed.

Q. (By Mr. Erickson): Now, referring to Exhibit 1, Doctor, which is the X-ray of one view of Miss Murphy's cervical spine, will you point out to the Court and to the jury what that exhibit shows?

A. This is a side view. This extremely dense or white portion of the shoulder area at the bottom of the film on the upper left-hand corner is the jaw-bone. There is the back of the skull in the upper right-hand corner. There are seven cervical vertebrae normally, that is, seven vertebrae between the skull and the shoulder, 1, 2, 3, 4, 5, 6, and here's a portion of the 7th (indicating). Now, you will notice there are spaces between the vertebrae. Between 2 and 3 and 3 and 4 and 4 and 5, they are of nearly the same width. That black space between each of the vertebrae is occupied by a less dense substance than bone, it is occupied by cartilage, and that is why it appears blacker on the X-ray, and that cartilage is known as the intervertebral discs, and they are to the human body what the shock absorbers are to an automobile or a mechanical contraption. You will notice that there [99] is a markedly decreased space between the fifth and sixth cervical vertebrae.

Q. Doctor, in connection with that last observa-

(Testimony of Dr. Howard M. Clemmons.)

tion, would you assume and expect, on the basis of your examination of other persons and your experience as an orthopedic surgeon, that the intervertebral space would be the same in the area you have marked between those two vertebrae as in the others above it, in the normal circumstance?

A. It should be approximately the same width or thickness, yes, normally.

Q. So if the thickness is less than the normal, that would represent an abnormality, is that correct?

A. That's right; it would mean that there was something wrong with that particular intervertebral disc. You will further notice that there is a notch in the front and top side of the body of the sixth cervical vertebra. You will notice on this vertebra (indicating), and the one below it, that the vertebra beaks down, it has a little beak on it. You will notice that this vertebra (indicating) is flat. You will notice that this notch would fit this particular portion (indicating). This has every indication from the X-ray appearance alone, and not based on any past history, or any other findings, of an injury, of a fracture of the cervical spine, or in common parlance, a broken neck.

Q. Now, Doctor, in relation to that particular X-ray, and [100] based upon your qualifications as an orthopedic surgeon, assuming that Mildred Murphy had had no trouble with her cervical spine and no pain in the neck, and that she went into the Safeway Store on Granite Street here in Butte, and

(Testimony of Dr. Howard M. Clemmons.)

walked onto the floor, and her feet shot out from under her, and she landed on her back, first on the lower spine, and finally with her head cracking hard against the floor, and assuming that immediately she felt a pain in her neck in the area indicated as the area where the intervertebral disc is reduced in size, and assuming that that pain has continued to date, can you say in your opinion whether or not such a fall under the circumstances that have been assumed could have caused the reduction in the intervertebral disc area, and the broken neck or the fracture that you spoke of?

A. Assuming those things to be true, it could have easily caused such a thing, yes.

Q. Now, Doctor, is there anything else on that X-ray that we laymen, our attention should be called to, indicating whether or not there is an abnormality of any kind?

A. No, sir; those are the only pathological findings.

Q. Thank you. Now, Doctor, if you will—may I ask you one more question? Is there any indication of any arthritic change in the X-ray you have just shown of the cervical spine?

A. That particular area there is often referred to in writing X-ray reports, I mean the appearance of such an area, [101] as an arthritic change, but here again, it is localized, and should be differentiated from the so-called chronic arthritis of aging.

Q. Now, in connection with this picture, Exhibit 1, would you differentiate between an arthritic

(Testimony of Dr. Howard M. Clemmons.)

change and a change that comes from trauma or injury as we have here?

A. Well, if I were to see those changes throughout her neck on the X-ray, I would conclude that those were chronic arthritic changes. Since it is localized to this area, I conclude that it is a traumatic arthritis, that is, the same changes have come about, but were produced locally in one place by an injury.

Q. And when you speak of trauma, you speak of an injury, that is, in medical terminology, and it could be the breaking of a leg or a cut or anything of that kind, is that correct, when you speak of trauma?

A. That's right; trauma is a general word meaning injury.

Q. And from an examination of the X-ray, whether it is characterized as arthritis or something else, the result would still be the same, in your opinion, an examination of the X-ray indicates an injury or trauma, is that correct?

A. That's correct.

Q. Now, if you will go back to your report again, Doctor. You have described Exhibit 1, and some mention is made in your report of some irregularity of the supero anterior aspect of [102] the body of C6. Now, has that already been covered in your description, is that the break?

A. That's the irregularity that was described, yes, sir.

(Testimony of Dr. Howard M. Clemmons.)

Q. Now, will you go ahead with your report from there, Doctor?

A. X-rays of the dorsal spine were also made, front and side views. That's the area of the spine between the shoulders and the waist, approximately, and some minimal arthritic changes were found throughout that area. They were generalized.

Q. And it is true that generally people of the age of 50 or over will show some arthritic changes, or is that, or is that not true?

A. Well, it's not necessarily true, but if they do show changes and they are generalized, it is consistent with the aging process.

Q. But in the case of the cervical spine, when you found it only in connection with the two vertebrae, 5 and 6, as you have already testified, in your opinion, that would not be the arthritis of aging, is that correct?

A. That's correct; it is the localized arthritis seen after an injury. X-rays of the lumbosacral spine—that's the portion from the waist to the pelvis—were made, and I always take three pictures, one front, one side view, and then a detailed shot to show a side view of the last joint there, the lumbosacral joint. It also shows the lumbosacral angle, that is [103] the angle between the body of the fifth lumbar vertebra and the sacrum. Normally there is an angle of about 30 or 35 degrees. However, X-rays taken of this lady showed an increase in that angle. In addition to that, there was a de-

(Testimony of Dr. Howard M. Clemmons.)

crease in the joint space between the fifth lumbar vertebra and the sacrum.

Q. Do you have the X-ray showing that with you, Doctor? A. Yes, sir.

Q. Now, I have had marked, Doctor, an X-ray as Plaintiff's Proposed Exhibit 2, and this is one of the X-rays taken when you examined Miss Murphy on November 14, 1958, is that correct?

A. That's correct.

Q. And it shows what, generally, the lumbar region?

A. Well, it shows a part of the 3rd lumbar vertebra, the 4th, the 5th, and the upper portion of the sacrum, the lumbrosacral joint, and the angle.

Q. And it's a true representation of what her condition was on that date, is that correct?

A. That's correct.

Mr. Poore: No objection.

Mr. Erickson: We offer Plaintiff's Exhibit No. 2.

The Court: It is admitted.

Q. Now, Doctor, if you would be good enough to put this on your viewing screen and explain what that shows to the Court [104] and jury?

A. This is a side view taken to show the lumbosacral joint and angle. This little——

Mr. Erickson: Could you speak just a little louder, Doctor?

A. This little building block structure here (indicating) is the third lumbar vertebral body. This is the 4th, 5th, and this is the sacrum (indicating). If we were to draw a line——

(Testimony of Dr. Howard M. Clemmons.)

Q. Could you tell the jury, Doctor, what the sacrum is, where we are in the human anatomy when we talk about those things?

A. The sacrum is the broad, flat, triangular bone about waist high and a little lower between these two pelvic bones which you feel when you stand. Have you got a pencil? This is the upper portion of the sacrum (indicating), this is the 5th lumbar vertebral body. Now, if we were to place a line parallel with the front and the back of the 5th lumbar vertebra, and draw another line parallel with the sacrum, we would see that there was approximately 70 degrees angulation. The normal angle is about 35. In other words, there is an increase in the swayback. In addition——

Q. You spoke of the lordotic or lordosis curve, is that what originates the lordosis curve?

A. That's right; it's a lumbar lordosis. There is also a [105] cervical lordosis, but now, if we look at the spaces between the bodies, you will notice that the space between the lower aspect of the front of the body of the 5th lumbar vertebra, and the front or top portion of the sacrum is quite wide, but as we go back, follow these lines (indicating), the back portion of the space between the 5th lumbar and the sacrum segment is markedly decreased. This space—that's why it appears blacker on the X-ray—is known as cartilage, and is known as one of the intervertebral discs. That I consider an abnormality.

(Testimony of Dr. Howard M. Clemmons.)

Q. And why is it abnormal in this particular instance, because of the reduced space?

A. Well, first because of the reduced space there, and the increased angulation.

The Court: Let me ask a question, Doctor. Does that reduced space at the—what do you call it?

A. The lumbosacral joint space.

The Court: Well, it is reduced at one place and expanded at another, isn't it?

A. That is true. It is held taut here (indicating) by a ligament.

The Court: Well, all that that indicates is that there is a difference in the angulation between the lumbar spine and the sacrum, is that all that it indicates?

A. Yes. The X-ray man, having never examined the patient [106] clinically would give you a report, increased lumbosacral angle, decreased space between L5-S1.

Q. (By Mr. Erickson): Now, in connection with that particular decreased space, and based on your study and the fact that you qualified as an expert, and your experience in other cases, would you say that that is or is not a normal condition insofar as that condition is concerned?

A. It is not normal, it is abnormal.

Q. And why is it abnormal, the increased—decreased space?

A. Increase in the angle between the sacrum and the lumbar spine throws a strain on that joint, with or without injury, and the pressure exerted

(Testimony of Dr. Howard M. Clemmons.)

by the sacrum at that angle, because of the strain exerts greater pressure on the intervertebral disc at that level.

Q. Do you have other X-rays showing and illustrating this same point of the change in the intervertebral space between the 5th and 6th lumbar vertebrae, or between the lumbar and sacrum, I guess it is?

A. Yes; I have another view, or I should say another film of the same view of the same patient taken April 7, 1959.

Q. Well, I want to restrict it now to this particular examination. This is the only one you have on the November 14, 1958, examination?

A. That's right.

Q. Now, Doctor, assuming that Mildred Murphy complains of a [107] low back pain in the general area indicated on the film, and is that between the 5th and 6th, or the 6th and the sacrum?

A. Well, between the 5th lumbar and the sacrum.

Q. And the sacrum. Assuming that Mildred Murphy complains of pain in that area, and an ache, could this condition, in your opinion, cause an ache or a pain? A. Yes, sir.

Q. Now, Doctor, assuming that Mildred Murphy had never had any trouble with any pain in the region of the lower spine, the area we are now talking about, and assume that she had, prior to June 24, 1958, worked as a waitress and been able to carry heavy trays and dishes, and assume further

(Testimony of Dr. Howard M. Clemmons.)

that she walked in the Safeway Store on that date on Granite Street, and that she walked in on the hard floor, which is an asphalt tile, I believe over concrete, and that her feet suddenly shot out from in under her so that her feet were in the air and she landed on her back, in your opinion, could the condition which you now find that is abnormal have been caused by such a fall?

A. Definitely, yes, sir.

Q. Now, do you notice any arthritic change in the particular lumbar area there? A. No, sir.

Q. So that that abnormality you see down there, you would not characterize it as an arthritic [108] change?

A. I see no evidence of any arthritis in that film.

Q. Do you have any other X-rays taken on November 14, 1958, on that examination of Miss Murphy?

A. Nothing that shows any significant changes.

Q. Well, I call your attention to your report where you say there appears to be some disturbance in the lumbosacral in the AP on the right side, which appears to be a fragment of bone.

A. Oh. Well——

Q. May I mark that, Doctor?

A. Yes.

Q. Showing you an X-ray marked Plaintiff's Proposed Exhibit No. 3, is this another one of the X-rays taken at the same time as Exhibits 1 and 2?

A. Yes.

Q. It is a true and correct representation of the condition of Miss Murphy? A. Yes.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Erickson: We offer it.

Mr. Poore: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 3 admitted in evidence.)

Q. Now, if you will explain what that shows to the Court and to the jury?

A. This is an AP view of the lower portion of the spine, which shows also the pelvic and hip joints. The 5th, 4th, 3rd, [109] 2nd and 1st lumbar vertebrae are seen, and the wide brim of the pelvic bone are seen on either side.

Q. Doctor, before you go further with that, your Exhibit 2 was of the same general area, but was a side view, is that correct?

A. That's correct; it was taken right through here (indicating).

Q. Now, insofar as the representation of the intervertebral space, with this view can you see anything that you consider abnormal so far as this view is concerned?

A. No; we don't take this view for that simply because we want a good look right through the joint space, and this doesn't give it to us.

Q. It wouldn't show the narrowing that was in Exhibit 2, is that correct?

A. It shows a false narrowing on anybody, simply because of the shape and the position of the bone.

Q. So that for the purpose of determining the extent of the abnormality, if any, of the interverte-

(Testimony of Dr. Howard M. Clemmons.)

bral space, you get that from a side view, and not from a front view, is that correct?

A. Correct.

Q. Now, if you will go ahead, Doctor?

A. Now, I call your attention to the 5th lumbar veterbra. This is marked with a lead marker before the film is exposed, [110] and this is a big "R," which stands for the right side of the patient's body. You will notice that right in here (indicating) is a white area that is not connected to the bone area around here (indicating). It is not quite triangular, but it is roughly triangular, and if you look closely at it, you will find that it differs in appearance from this bone right here (indicating). If you look closely at this (indicating), you will find little white lines that run through this bone, because this bone is more like a honeycomb. In that honeycomb, the holes in there are where the blood passes through. This is homogenous, amorphous, shapeless (indicating). These little white lines in there are called reticulations. Here there are no reticulations (indicating), so one, when looking at this film, would conclude that this formless mass is not bone, but it's calcium. Where did it come from? You don't see it over here (indicating). It might represent a fracture except for this homogenous consistency.

Q. Is that a normal thing you would expect to see in an X-ray? A. No; that's abnormal.

Q. Is there anything further on that particular X-ray?

(Testimony of Dr. Howard M. Clemmons.)

A. I can't draw any conclusion from that film alone.

Q. Now, Doctor, is there anything else from your first examination on these X-rays that we have not covered? [111]

A. No; I think we have covered it.

Q. Now, Doctor, you made another examination of Mildred Murphy, did you not? A. Yes, sir.

Q. And when was that made?

A. That was the 7th of April, 1959.

Q. And that is the report I have not yet seen, is that correct, Doctor? A. That's correct.

Q. Now, did you again give Miss Murphy a thorough examination and take X-ray pictures?

A. Yes, sir.

Q. Now, we will reverse the process, and I'll ask you to produce the X-rays taken on April 7th which covers this same area, the front view, the same as No. 3?

(Witness produces X-ray.)

Q. The X-ray has been marked for our identification as our No. 4, and it was taken on April 7, 1959, is that correct? A. Correct.

Q. At your office? A. Yes, sir.

Q. It is a part of your regular files?

A. Yes, sir.

Q. And is it a true representation of the condition of Miss Murphy, as demonstrated by that X-ray as of the date it was [112] taken?

A. It is.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Erickson: We offer No. 4.

The Court: It is admitted.

(Plaintiff's Exhibit No. 4 received in evidence.)

Q. Now, Doctor, if you will, perhaps, keep both of these for the purposes of comparison, 3 and 4, and point out to the jury any significant changes which may or may not have occurred in the two X-rays?

A. Now, I asked you to look at this triangular area of calcium, and here it is in this one (indicating). Here is the same area on the other film (indicating) taken April 7, 1959, and it is no longer there.

Q. Now, do you draw any conclusion as an expert as a result of the presence of the calcium in November of 1958 and its absence in April of 1959?

A. Yes, sir.

Q. What is that conclusion?

A. First of all, it was not a fracture because of its shape and because of the fact it has disappeared. There was calcium, and it was probably calcification in a blood clot or hematoma, which is always of traumatic origin, due to injury.

Q. Now, Doctor, if you will resume the stand, would it be possible for a trauma to the intervertebral space between the 5th lumbar and the sacrum to produce a blood clot or an [113] embolism of any kind?

A. No. It would be possible for a fall or an in-

(Testimony of Dr. Howard M. Clemmons.)

jury to produce a blood clot in a muscle, which is the location of this little calcified area.

Q. Now, assuming again the same set of facts, Doctor, of Mildred Murphy going into the Safeway Store on June 24, 1958, and suffering the fall that has heretofore been described, can you say whether or not in your opinion the blood clot, or—what did you call it, embolism? A. Hematoma.

Q. Hematoma.

A. That's a fancy name for it, but it's just a blood clot within a soft tissue structure.

Q. In your opinion, could that have been suffered as a result of the fall heretofore described, assuming the fall occurred?

A. Yes, sir; it could.

Q. And in view of the fact that it disappeared in the six months period or the five months period, could you draw any conclusion as to how old the blood clot was, or the calcium deposit was in November, 1958, when you first discovered it?

A. No, sir; I couldn't.

Q. Well, could you say whether it was of relatively recent origin, or it might have been congenital or old?

A. Well, let's see, January, February, March, April, if it [114] disappeared within five months from the time I saw it on the first film in November, I would assume that it was approximately that old originally.

Q. Now, Doctor, was there anything further, Doctor, in connection—

(Testimony of Dr. Howard M. Clemmons.)

The Court: Pardon me, may I ask a question? Did I understand you that if it disappeared in the five months from November to April that in November is that it must have been at least five months old at that time?

A. That's correct.

Mr. Erickson: I believe his testimony was that it would have been about five months old, rather than at least.

A. Approximately, I mean I can't draw any specific conclusion as to the date and hour, but these things take from eight to 18 months to absorb.

Q. (By Mr. Erickson): And this one apparently absorbed in about five months, is that correct?

A. It's possible.

Q. Was there anything else, now, in connection with Exhibits 3 or 4, Doctor, that you want to call the jury's attention to, or that you should call the jury's attention to?

A. No; I think we have covered the important point on that X-ray.

Q. Now, Doctor, did you take some X-ray pictures of the lumbar spine on this examination on April 7, 1959? [115]

A. Yes, sir.

Q. And you have an X-ray or X-rays covering that area?

A. Yes, sir.

Q. And it was taken on April 7th of Miss Murphy, and it is a true representation of what the X-ray showed as of that time, is that correct?

A. That's correct.

Mr. Erickson: We offer Exhibit 5.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: No objection.

The Court: It is admitted.

Q. Now, Doctor, if you will take Exhibit 5, and I believe Exhibit 2 of the comparative area, and if you will tell the Court and jury what Exhibit 5 shows and then compare it with Exhibit 2?

A. These are views of the lumbosacral joint, the one on the right was taken November 14, 1958, and the one on the left April 7, 1959. It shows the increased angle, and, in my opinion, a decrease in the joint space, particularly at the back, between the 5th lumbar vertebra and the sacrum, as compared with this view (indicating). It is a progressive change.

Q. In other words, the situation hasn't remained static, but the amount of the lordosis or lordotic curve and the angle has changed, is that correct?

A. Not so much a change in the angle as a change in the [116] joint space, which has decreased.

Q. Now, would you expect normally to see in a period of five months a change in a normal spine in the amount of the space, the intervertebral space?

A. Not without some element being introduced, and that element is usually trauma or injury which brings about a change like that.

Q. Now, in a case where the intervertebral disc has been reduced where the reduction is due to injury or trauma, explain to the Court and jury how that operates? Is it an immediate change, or is it a gradual change?

(Testimony of Dr. Howard M. Clemmons.)

A. There is usually a gradual change. For example, in cases of injury to an intervertebral disc where we take X-rays on the same day of the injury or a day or two following, we usually don't see any change on X-ray. It is a few months later that we begin to see a decrease in the joint space, as there is a wear and tear produced on the injured disc. It degenerates, it wears out.

Q. Now, assuming, Doctor, the same question that we have asked before that Mildred Murphy had no trouble with her back, lower back, and she worked and carried trays, and she suffered the described fall, and having in mind these two X-rays, can you give your opinion whether or not this progression or retrogression would be possible as a result of the injury that occurred in that fall that occurred on June [117] 24, 1958?

A. Yes, sir; it would be possible.

Q. Can you say, Doctor, from your experience whether or not a decreased space in a situation like that shown in these two X-rays, 2 and 5, could cause pain and discomfort to the person who had that condition?

A. Yes, sir; they usually do.

Q. And can you say whether or not that sort of a situation that we see between the 5th lumbar and the sacrum would disable a person from doing heavy work, and, more particularly, disable a person from carrying heavy trays?

A. Yes, sir; it would.

Q. Now, with relation to that situation would you say that Mildred Murphy's spine in that area

(Testimony of Dr. Howard M. Clemmons.)

is worse or better now than it was in November, 1958? A. It is worse.

Q. In your opinion, Doctor, as an expert, can you say whether that condition will or will not progressively get worse?

A. I can't say with any degree of prophecy, but based on past experience, when I see a change this marked that is progressive within this length of time, I would look forward to seeing it get worse as time goes on.

Q. Now, this is not the same as a ruptured intervertebral disc, is it? [118] A. No, sir.

Q. It is an entirely different thing?

A. That's right.

Q. Is there anything else on Exhibit 5 and Exhibit 2 that should be called to the jury's attention? The doctor will understand, as will the Court, that this is not a field that I as a lawyer know a lot about, and I have to depend upon the doctor to point out any significant facts.

A. No, sir; I think we have covered that.

Q. Now, in addition to this last X-ray, which was No. 5, did you take on April 7th any X-rays of the cervical spine? A. Yes, sir.

Q. And do you have that X-ray with you?

A. Yes. Mark it right up there, and I think we will be safe.

(Witness produces X-ray.)

Q. This X-ray which we will have marked for identification as Plaintiff's Exhibit 6 was taken on

(Testimony of Dr. Howard M. Clemmons.)

April 7th of 1959? A. Yes, sir.

Q. It is a part of your files?

A. Yes, sir.

Q. And it is a true representation of the condition of Mildred Murphy, as shown by the X-ray?

A. Yes, sir.

Mr. Erickson: We offer Plaintiff's Proposed Exhibit No. 6. [119]

Mr. Poore: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 6 here received in evidence.)

Q. Now, Doctor, if you will take Exhibit 6 together with Exhibit 1 and point out to the Court and jury any significant matter shown by those exhibits?

A. These are both side views of the neck. The one on the left is the one taken November 14, 1958, and the one on the right was taken April 7, 1959. Now, you will notice this beak-like projection from the body of the 5th cervical vertebra. There is a whiter, denser line than there is across here (indicating).

Q. The first one you are referring to is the Exhibit 6, is that correct.

A. That's right. There has been a little further change in the appearance of the lower and front side of the body of the 5th cervical in the last film as compared with the first, about some five months difference.

(Testimony of Dr. Howard M. Clemmons.)

Q. And what does that indicate to you, Doctor, as far as the progress or lack of progress being made by Mildred Murphy insofar as that area is concerned?

A. Well, that density is usually caused by impingement, that is, when one bone abnormally rubs up against another one, it builds up that denser bone, and it appears whiter on the X-ray, so I would say that irritation was the factor. [120]

Q. And would you say from your examination of those two X-rays, and as an expert in the field whether or not the situation is worse or better now, that is worse in April than it was in November?

A. By X-ray it is slightly worse in appearance now than prior.

The Court (Jury admonished): Court will stand in recess until 4:15.

(Ten-minute recess.)

Q. Dr. Clemmons, is there anything else on any of these X-rays that needs to be pointed out in addition to what you have pointed out specifically?

A. No.

Q. Now, Dr. Clemmons, assuming the same state of facts we have assumed before, that is Mildred Murphy on June 24, 1958, walked into Safeway Store on Granite Street in Butte, and as she walked in on the hard floor, her feet shot out from under her, and she landed flat on her back and her head hit down on the floor, and a bump immediately developed, and that before that time she had no

(Testimony of Dr. Howard M. Clemmons.)

trouble with her neck or her back, are there any of the abnormalities on these X-rays, in your opinion, that could not have been the result of the fall under the circumstances related? A. No, sir.

Q. It is your opinion, then, that all of these abnormalities [121] you mentioned, the breaking of the neck, and the injury to the lower spine, all of those could have been caused by a fall such as I have described, is that correct?

A. That's right.

Q. Now, Doctor, assuming that Mildred Murphy, in this fall, which we have described, hit the back of her head violently upon the floor, the hard floor, and immediately a large lump was raised, and assuming that thereafter for several days she suffered from a severe throbbing headache, and assuming that she was hazy and nauseated and vomited, and assuming now that the headaches, while not of the same kind, not the throbbing kind, but periodic headaches, headaches which she did not have before June 24, 1958, as an expert, have you an opinion as to whether or not such a blow could be the cause of the continuing headaches? A. Yes, sir.

Q. What is your opinion?

A. It is my opinion that such a blow could be the cause of the headaches.

Q. Is there a medical term to express that idea?

A. Yes, sir; it goes under the name of post concussion syndrome.

Q. And what is a syndrome?

A. Well, that syndrome is a symptom complex,

(Testimony of Dr. Howard M. Clemmons.)

or a group of related symptoms. In this case that you describe, headache, [122] hazy, dizziness, nausea, vomiting and protracted headaches would be the symptoms.

Q. Now, Doctor, considering all of the abnormalities that you have pointed out in the X-rays, have you an opinion as to whether Mildred Murphy could go back to her former occupation of waitress, a job with which you would be familiar as a part of your common experience, but a job involving the carrying of heavy trays raised up on one hand, or carried in two hands, or heavy dishes? Have you an opinion as to whether she is physically able in view of these abnormalities to do that?

A. Yes, sir.

Q. What is that opinion?

A. It is my opinion that she is unable, in view of these abnormalities, to pursue that type of work.

Q. Now, based on these examinations, have you an opinion as to whether or not she will in the future be able to do that kind of work?

A. Yes, sir.

Q. And what is that opinion?

A. We have seen progression of the findings on X-rays, and with that in mind, it is my opinion that her condition will become progressively worse, and she will not be able to do that kind of work.

Q. So any employment that would require the carrying of trays [123] or heavy dishes, it is your opinion that she will not be able to do that, is that correct?

A. That's correct.

(Testimony of Dr. Howard M. Clemmons.)

Q. And so far as that kind of work is concerned, she is, in the usual sense of the words, totally disabled, is that correct? A. That's correct.

Q. Now, Doctor, based on your examination, have you an opinion as to whether further medical treatment and care will be necessary for Mildred Murphy in the future? A. Yes, sir; it will.

Q. And have you an opinion as to whether that will be over a long period of time?

A. It probably will.

Q. And do you have any opinion, or can you make an estimate based upon your examination and on your own experience as a doctor, and knowing generally the medical profession, have you any opinion as to what the probable cost of the future medical attention she may require will be?

A. That would depend on how extensive the treatment was, and I have no way of looking into the future. It would also depend upon whether surgery was ever necessary.

Q. Well, from your examination, is there any opinion on your part that surgery might in the future be required?

A. It might possibly be on the lower back, [124] yes.

Q. And what would the nature of that surgery be?

A. Probably an exploration of that lumbosacral intervertebral joint space to see if there was encroachment on the nerve roots by disc material, followed by a spinal fusion, that is, an operation to

(Testimony of Dr. Howard M. Clemmons.)

graft in bone to prevent motion between the last lumbar vertebra and the sacrum.

Q. And if such an operation was necessary, would you have an opinion as to what the probable cost would be, the medical end and the hospital?

A. Oh, I suppose about \$1,500.

Q. And in the absence of the more radical treatment of surgery, the treatment would be a continuation of drugs and rest and that sort of thing, would that be the normal procedure? A. Yes, sir.

Q. And if that procedure were followed, do you have an opinion as to what the probable cost in the future will be to Miss Murphy for treatment?

A. Well, it might run as high as 2 or \$3,000. That's an estimate.

Q. Yes; I understand that. A. Yes.

Mr. Erickson: I believe that's all. [125]

Cross-Examination

By Mr. Poore:

Q. Doctor, prior to your examination of Miss Murphy in November, 1958, had you ever treated her? A. No, sir.

Q. Never known her at all in the relationship of doctor and patient? A. No, sir.

Q. In your examination of her in November, 1958, as I understand it, it was at the request of Mr. Erickson? A. That's right.

Q. And your report of examination was to Mr. Erickson? A. That's correct.

(Testimony of Dr. Howard M. Clemmons.)

Q. And you didn't at that time endeavor to treat Miss Murphy?

A. She was under treatment by another doctor.

Q. All right, but as far as you were concerned, you did not endeavor to treat her at that time?

A. I wasn't asked to by the other doctor, which would have been the only condition under which I would have accepted the case.

Q. Nor, in your examination on April 7, 1959, that was not directed to any treatment of the patient yourself? A. No, sir.

Q. So would it be correct, Doctor, that your examination was [126] purely for the purpose of drawing the pleadings and testifying at this trial?

A. No, sir; the purpose of my examination was to determine her present conditions and report those to her attorney.

Q. That's right, but not for the purpose of advising her of any course of treatment?

A. That's right.

Q. Now, Doctor, one thing I don't understand is relative to Plaintiff's Exhibit 4 and Plaintiff's Exhibit 3, down in the lumbosacral area, that little lump of calcification, that hematoma, I believe you called it, that disappeared in the five months between November, 1958, and April 7, '59, and from that you were able to conclude that since it had gone away in those five months, that it must have originated about five months before?

A. As near as I can say.

(Testimony of Dr. Howard M. Clemmons.)

Q. Would you spell that out a little bit more? Why does that follow?

A. Whenever an injury takes place that causes hemorrhage and calcium does form, very often it will absorb.

Q. Well, you were reasoning, then, that this was formed at the time of injury?

A. The hematoma was, the calcium probably some time shortly thereafter.

Q. In other words, you weren't reasoning that since that [127] much of it disappeared in five months that it was of such size originally that it must have originated in July of 1958? In other words, you couldn't do that? A. Oh, no.

Q. Because you didn't know the size of it originally? A. That's right.

Q. Now, it would necessarily follow, wouldn't it, Doctor, from the fact you had never seen or treated Miss Murphy prior to November, 1958, that you had no first hand knowledge of her condition at any time prior to that time?

A. Only by the history she gave me.

Q. And did you base your opinion in part upon the history she gave you?

A. Doctors always do.

Q. And this testimony would be based in part upon the history she gave you?

A. My conclusions were drawn from physical findings and X-rays.

Q. Well, then, her statements to you or her ex-

(Testimony of Dr. Howard M. Clemmons.)

planation to you would not be taken into consideration by you, is that right?

A. Well, they are always taken into consideration when a doctor examines a patient, but the explanations I gave here today are not related to history.

Q. Now, if you did not know of her condition prior to [128] November, 1958, naturally you wouldn't have known whether these conditions antedated or existed before June 24, 1958, would you?

A. That is correct.

Q. So your opinions would necessarily be based, as they obviously were, upon the hypothetical statement of the facts by Mr. Erickson?

A. That's right.

Q. Assuming that an operation is performed upon this lady, would she then be able to return to her normal occupation?

A. I couldn't answer that because one cannot guarantee the successful or unsuccessful outcome of this type of surgery.

Q. But in your particular field, aren't you expert in the area of rehabilitation?

A. Well, I have been interested in it, yes.

Q. And isn't it also true that a fusion of the bones renders them capable of performing the function for which they had been designed?

A. That's one of the chief reasons for doing a bone graft on the lower spine, to stabilize it so people can return to work.

Q. So that if, for example, you or some other

(Testimony of Dr. Howard M. Clemmons.)

capable physician performed the operation, would it be reasonable to expect she would be able to return to her usual occupation?

A. We would do the surgery with that in [129] mind.

Q. That would be the purpose of it?

A. That's right.

Q. And you have been talking in the terms of possibilities, would it not be true that it would be more probable than not that there would be success in that field?

A. I haven't added Miss Murphy to my statistics, so I can't answer that.

Q. Pardon me?

A. I say I haven't added Miss Murphy to my statistics. Whereas, between 80 and 90 per cent of these operations are successful, if hers were unsuccessful, that would be 100 per cent to her.

Q. Sure, it is nice to have a crystal ball at any time, but in other words, the statistics are 80 to 90 per cent success in this particular operation?

A. In general that is true, yes.

The Court: Doctor, is the arthritis, arthritic condition of age general throughout the body, or is that likewise localized?

A. It is more generalized.

The Court: And if you expect to find—if you do find what you believe to be an arthritic condition due to age at one place, you would expect to find that same condition, or nearly the same, throughout the body in the joints?

(Testimony of Dr. Howard M. Clemmons.)

A. Not necessarily throughout the body, but throughout that [130] particular area of the body. In other words——

The Court: Then, would you distinguish between the various areas of the spine, or would the spine be an area?

A. Well, the cervical spine, the neck——

The Court: Would be one area?

A. Yes; the dorsal spine another, the lumbar, and so on.

The Court: So you might very well find age arthritis in the dorsal spine, and not find it in the cervical?

A. That's true; yes, sir.

Q. (By Mr. Poore): Well, what, if any, significance does the fragment in the cervical spine have in this particular case, Doctor? I believe you referred in your report to a fragment in the area of the cervical spine. What would you say the medical signification of that would be?

A. That was in the lumbosacral.

Q. Well, let's put it this way: Calling your attention to the cervical spine, and the area you refer to as a fracture or breaking, what significance is that?

A. Well, the mechanism of the fracture in the cervical spine, that is, the way they happen is usually forward flexed.

Q. Is there any indication of nerve injury here to the spinal column? A. No.

Q. So that's what I am directing my question

(Testimony of Dr. Howard M. Clemmons.)

at. There is all kinds of fractures. I believe I heard you testify that [131] fragments of bones can be knocked off, for example, of the kneecap, and not affect the utility or what that portion of the body was designed to do, not affect its effectiveness. Now, what is the story on this fragment?

A. Well, it is not a separate fragment. I believe that there is irregularity on the under surface of the 5th cervical vertebra that matches the irregularity on the top of the 6th, both of which are abnormal in shape, and in my opinion are due to a forward flexed position of the head. Now, that's not the whole story. In addition to that, the intervertebral disc has been injured.

Q. Yes, but now we were talking a few minutes ago about the so-called broken neck. What were you referring to there?

A. That fracture; the compression.

Q. What fracture? Was there an actual fracture?

A. Well, fractures of vertebrae are compression type, whereas fractures of the long bones usually result in pieces becoming displaced.

Q. Now, don't fractures ordinarily heal?

A. Well, that's healed.

Q. So it's a healed fracture?

A. With the irregularity resulting and remaining.

Mr. Poore: No further questions. [132]

(Testimony of Dr. Howard M. Clemmons.)

Redirect Examination

By Mr. Erickson:

Q. With relation to the last question asked by counsel, I think you testified on direct examination that the healed fracture results in roughness, plus decrease in the intervertebral space, and you said, I believe, that that would cause discomfort and pain to Miss Murphy, is that correct?

A. That's correct; by limiting the motion of the neck, and with that abnormal condition of the structures there, muscle spasm.

Q. Now, Miss Murphy on the stand this morning, you may have observed her, put her hands around the back of her neck and raised her head up several times. She indicated she did that to get relief from discomfort in the neck. Could that be of significance as to whether or not this particular fracture condition might have caused her this discomfort?

A. Very frequently the patient will continue to complain of pain and will get relief by bending the neck backwards.

Q. The question was asked you, Doctor, about the history that was given, and you said since you had not examined Miss Murphy prior to November, 1958, you could not say positively whether that condition existed before June 24, 1958, or not. Now, Doctor, assuming, in response to that question, the hypothetical question we have given you before,

(Testimony of Dr. Howard M. Clemmons.)

and assume further that Miss Murphy had no pain in the cervical spine, no [133] discomfort in the cervical spine, and no pain or discomfort in the lumbosacral area, and had worked as a waitress carrying heavy dishes, and that on the day of the assumed fall, she immediately felt severe pain in her neck and in the cervical spine, and that by the next day severe pain took place or occurred in the lower spine, could you say, give an opinion, Doctor, as to whether or not this assumed fall could have caused the abnormality as of the time of the fall?

A. Yes, sir.

Q. And what is your opinion?

A. The opinion is that it could have produced the pains we have talked about here.

Q. You spoke of the possibility of surgery on the lower lumbar spine and a fusion. Would such surgery be practical or possible in the cervical spine, the neck?

A. Well, I recently did such a case.

Q. And was it successful, Doctor?

A. So far.

Q. Now, eliminating the lumbosacral area where a fusion is a possible method effecting some sort of repair, and eliminating that, have you an opinion as to whether or not the disability in the cervical area is sufficient so that it would disable Miss Murphy from carrying heavy trays, heavy dishes, heavy burdens, in her former occupation of waiting on table? [134]

A. The changes by X-ray in the neck are worse

(Testimony of Dr. Howard M. Clemmons.)

than they are in the low back, and I think that either one would be capable of limiting her activity, but if she had no trouble with the low back, I would say that, in my opinion, the trouble she has with the neck would be enough to eliminate her returning to the type of work she did prior to that.

Q. So that if surgery were performed for the purpose of putting her back on the job, it would be necessary to perform surgery both on the cervical and the lumbar, is that correct?

A. It may be necessary, but let me say in relation to doing a fusion on the cervical spine, it's extremely difficult to do that for this condition, and in my opinion would be rather radical. The reason I did it on the patient I spoke of prior was because he had a dislocated neck. It is rather radical surgery. It does leave the patient with an entirely stiff neck. We put him in this position (indicating), and the only thing he can move is his eyeballs. He can't move his neck after that.

Mr. Erickson: Thank you, Doctor, that's all.

Mr. Poore: No further questions.

(Witness excused.)

DR. LEO FRED ROTAR

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows: [135]

Direct Examination

By Mr. Erickson:

Q. Will you please state your name, Doctor?

A. Leo Fred Rotar.

Q. And your profession?

A. Physician and surgeon.

Q. And what university or medical school did you attend? A. St. Louis University.

Q. And you are now practicing in Butte?

A. Yes.

Q. And your offices are in the St. James Hospital Building? A. That is right.

Q. And how long have you been in practice, Doctor?

Mr. Poore: We would be happy to admit the doctor's qualifications.

Mr. Erickson: Thank you.

Q. I will just ask the question as to how long have you been in practice here, Doctor?

A. 16 years.

Q. And you are originally a Butte boy, are you not, Dr. Rotar? A. Yes.

Q. What is the type and nature of your practice?

A. Well, it is general practice, but we tend more toward traumatic work. [136]

Q. You are associated with Dr. Shields and

(Testimony of Dr. Leo Fred Rotar.)

others, are you not? A. Yes.

Q. At St. James Hospital? A. Yes.

Q. Here in Butte? A. Yes.

Q. And you were—you had your office in St. James Hospital on June 24, 1958, did you not?

A. Yes.

Q. Do you recall Mildred Murphy, the plaintiff in this action, came to see you on that date?

A. Yes.

Q. Will you tell the Court and jury what her condition was when you first saw her?

A. Well, when she came into the hospital for treatment that day, she had to be kind of more or less escorted in, somebody had a hold of her elbows on each side, she walked in on her own power, but she was definitely stunned; she had sustained quite a severe blow; and at that time my impression was that she got most of the blow on the posterior part of the head, the occipital area.

Q. Did she at that time give you a statement as to the history of her condition?

A. The history of her condition? [137]

Q. Yes; that is how she happened to have the blow?

A. Well, she slipped on the floor in the Safeway Store.

Q. And did you get that information from her?

A. Yes; I had that information.

Q. You got that from her?

A. From her.

Q. There was another person with her who has

(Testimony of Dr. Leo Fred Rotar.)

been identified here as Rose Ledingham. Did she give you any information as to the case?

A. I wouldn't recall that offhand.

Q. Will you tell us further about Miss Murphy's condition?

A. Well, the part of the body that received the most of the blow was the back of the head, and the way she explained her fall, the entire back was hit on the floor; so she had a contusion of the entire spine, the posterior part of the head and neck. That would be included in the spine.

Q. Now, can you describe to the jury this bump that you observed on the back of her head, as to whether it was large or not?

A. Oh, I would say it was approximately about—it wasn't raised too high, I mean as far as thickness was concerned, but it involved an area, oh, about four, four and a half inches in diameter.

Q. Now, you say that your practice has been very largely with trauma there, is that [138] correct? A. Yes.

Q. And it is a fact, is it not, Doctor, that people injured in the mines or industrial work, and all the hazards of manual occupations, you see trauma people like that, do you not? A. Quite a few.

Q. And could you say, give an opinion, Doctor, based on your experience and your training and your observation of Miss Murphy, the amount of the blow that would be required to cause the swelling that you saw?

(Testimony of Dr. Leo Fred Rotar.)

A. Oh, yes; definitely, there was no doubt about the amount of the swelling as related to the blow.

Q. Would you assume from the swelling that the blow was severe or not?

A. Severe; a severe contusion.

Q. What was her condition insofar as her other conduct? I have in mind, particularly, Doctor, whether or not she was in anything that would be designated by a doctor as a state of shock?

A. Well, she was stunned, you could say, mild shock. The blow was hard enough on the head to say that she had a mild concussion.

Q. And what, if anything, did you do, then, in the way of examination and treatment?

A. Well, X-rays were taken right immediately of the skull [139] and the entire spine.

Q. And the X-ray, as I understand, of the skull, showed no fracture of the skull?

A. No fracture at that time.

Q. Now, what did you do so far as Miss Murphy was concerned so far as treatment was concerned?

A. She was put on narcotics for pain and other medications for relaxing muscles.

Q. And that was done at her first visit?

A. First visit.

Q. Now, what did you tell her to do herself?

A. To be quiet, apply heat to any of the muscles that were sprained in the back. Her chief complaint was in the cervical area and upper back and posterior chest. That is where she took most of the blow, but I always advise patients to put heat on

(Testimony of Dr. Leo Fred Rotar.)

them, and probably tomorrow or the next day, or usually the next day, there are usually more aches and pains show up where they don't even think they got hurt.

Q. And was that the experience of Miss Murphy?

A. Yes; she had a lot more pain the following day.

Q. Now, Miss Murphy testified she was at your office, this was on a Tuesday, and she was there then again, I believe, on a Friday, do you recall that visit?

A. Well, no; I mean I can't pinpoint any individual visit, it is kind of hard to do when you have such a turnover of [140] patients.

Mr. Erickson: May I explain to the Court and to Dr. Rotar and counsel that I was not aware that the records of St. James were kept in a different spot than the doctor's office, and when I called today about them, it was explained to me that it would be difficult to get them, but I believe that Dr. Rotar has a sufficient personal recollection of this case so it is not necessary to have the records.

Q. Can you say how often you treated Miss Murphy?

A. Well, let's see, I would say it would average one to three times a week over an extended period of time, and then after she started feeling better, I saw her maybe every third or fourth week, but she was in at least once a month.

Q. And that has continued down to date?

(Testimony of Dr. Leo Fred Rotar.)

A. To date, yes.

Q. Now, what has the course of treatment consisted of that you have given Miss Murphy?

A. Actually, it is primarily rest and medication for pain and heat.

Q. And has Miss Murphy been a good patient insofar as co-operating with you is concerned?

A. Yes, sir; she has done everything she has been advised to do.

Q. Miss Murphy testified on the stand this morning that at one time, Doctor, you suggested that she try some exercises [141] which she was unable to do, do you recall that, an exercise in which she stood against the wall and pushed herself away, but she advised you the pain was too great?

A. Oh, that flicks a little memory, that is true. I never have patients exercise as long as there is any muscular spasm or pain, because you just cause more pain and spasm. I think I was trying to have her raise her arms above her head because of stiffness of her shoulders. She was not able to do it at that time, but I told her, oh, after two or three or four weeks passed by that she could continue the exercise.

Q. Doctor, have you noted, or will you tell the jury and Court what, if any, progress Miss Murphy has made since June 24, 1958, when you first saw her, up to the time of your last examination?

A. Well, as far as progress is concerned, I mean, she sustained a severe injury on—was it the 26th?

Q. The 24th.

(Testimony of Dr. Leo Fred Rotar.)

A. The 24th of June, and she had a pretty severe time for the first two weeks, then she gradually started improving, she started moving a little more, but her headaches have been more or less persistent through the whole course of therapy, and even vomiting and nausea, the first three or four days, if I remember correctly, and the headaches have become less severe, but she still states at times they recur, and——

Q. And what about the neck and the pain in the back insofar [142] as her subjective symptoms are concerned?

A. Well, now, she has some loss of motion laterally, lateral flexion on each side, and rotation, like this (indicating), but I have no basis to go on, she had that from the start, but right now, I mean she does not have normal rotation or normal lateral flexion. I have no norm.

Q. What about the lower back? Does she complain more or less of pain in the lower back?

A. When I saw Miss Murphy, the majority of her complaints were her neck and headaches. The complaints of the back, she did mention them, but not as persistently as she did the pain in the neck and the headaches.

Q. Doctor, has she given any indication of unusual nervousness?

A. Yes; there has been some accentuation of her nervousness following the accident, and for some time following I would say she was quite nervous for about three or four months after the accident,

(Testimony of Dr. Leo Fred Rotar.)

and I think when the pain started to subside, her nervousness subsided more or less.

Q. Now, you had not examined Miss Murphy prior to June 24, 1958, is that correct?

A. Well, I had taken care of her, but not for any neck ailment or back ailment.

Q. Now, did she complain to you about headaches prior to June 24, 1958? [143]

A. No.

Q. Did she complain about pain in the cervical spine? A. No.

Q. Did she complain to you about nervousness prior to that date?

A. No; not that I recall.

Q. Did she make any complaints about her spine generally?

A. No; no complaints of the area involved.

Q. Do you happen to recall when you last saw Miss Murphy before June 24, 1958?

A. Gee, I wouldn't know.

Q. But you had been her doctor?

A. I think I have seen her on two or three occasions for minor ailments or injuries before this accident.

Q. Now, you have seen, Doctor—pardon me, I have a question before that. I believe, Doctor, you told me that Miss Murphy had a certain amount of muscular spasm or spasm or rigidity of some kind, is that correct? A. That's right.

Q. Where was that?

A. It was mainly the cervical area and the pos-

(Testimony of Dr. Leo Fred Rotar.)

terior dorsal area, involving both shoulders, posterior chest, cervical muscles.

Q. And what does that mean, rigidity?

A. Well, you get a muscle that's sprained, swollen, spastic, [144] it is spastic because it is tender.

Q. And during the time you have treated her up to date, has Miss Murphy said anything to you about sleeping?

A. She has had trouble, persistent trouble sleeping.

Q. And have you prescribed anything for her?

A. She has been taking some type of sleeping pills almost continually, she did for some months after the accident. I don't believe she is on them now.

Q. Miss Murphy was unable to recall on the stand how many times she had prescriptions filled or what the prescriptions were, except that one cost \$2.50 and another cost \$2.50 and another one cost \$1.50, and I know you won't be able to give us that testimony, but it is true, is it not, that she has been having some sort of medication by prescription from you right from the start?

A. She has been on some tranquilizers as well as sleeping pills.

Q. And what is the purpose of giving her those?

A. For the nerves, and so she will be able to sleep.

Q. Doctor, have you seen any of the X-rays that are exhibits here, 1, 2, 3, 4, 5—

(Testimony of Dr. Leo Fred Rotar.)

A. No; I have never seen those pictures before except from a distance.

Q. And you haven't had a chance to observe them? A. No. [145]

Q. Doctor, based on your examinations of Miss Murphy and your treatment of her and her condition as it now is, have you an opinion as to whether or not Miss Murphy is able to work at the occupation of a waitress in which she would be required to hold heavy trays containing dishes in one hand and up at shoulder level?

A. I don't think she would be able to do it. She couldn't pursue that occupation.

Q. Doctor, you saw Mildred, of course, on June 24, 1958, when she gave you the history of the fall, but apart from that, do you have an opinion on this hypothetical question: Assuming that Mildred Murphy had worked as a waitress for some 30 years prior to June 24, 1958, and that she had had no particular trouble with her cervical spine or with her lumbar spine or with her head, and that she walked into the Safeway Store on Granite Street and fell in such a manner that her feet shot out from in under her and she landed flat on her back and hit her head, and that immediately thereafter the situation that you observed arose, the lump on the head, the pain and discomfort that has continued, have you an opinion as to whether the fall that we have assumed could have caused the difficulties for which you have been treating Miss Murphy? A. Yes.

(Testimony of Dr. Leo Fred Rotar.)

Q. And what is that opinion?

A. That it could have caused them. [146]

Mr. Erickson: That is all.

Cross-Examination

By Mr. Poore:

Q. Now, Doctor, I believe you said you took X-ray pictures of the entire spine in your treatment of Miss Murphy? A. Yes.

Q. And that they were negative?

A. They were negative as far as fracture was concerned, there was no bony pathology.

Q. So that from your examination of those X-rays, for the entire length of the spine, you were able to find no fractures? A. No.

Q. Now, Doctor, would you say that Miss Murphy's difficulties lay in muscle injuries?

A. Well, partially, yes.

Q. Well, what was your opinion as to what she was suffering from, or what had happened to her?

A. Well, it was a contusion of the head and back resulting in a spraining, probably of most of the muscles of the spine, followed by muscle spasm, muscle sprain, and probably some hemorrhage.

Q. Right. In other words, am I correct in this, Doctor, that it was a type of muscle injury that you would characterize as muscle sprain that caused difficulty, is that correct? [147]

A. Yes; at the onset muscular spasm was the cause of most of her difficulty, for the first two or three weeks.

(Testimony of Dr. Leo Fred Rotar.)

Q. And thereafter that gradually subsided, did it not? A. Yes; it subsided after——

Q. Then, am I correct in this, Doctor, that the X-rays you have taken, but which haven't been produced here in evidence, would show no fractures of the spine?

A. They revealed no fractures at the time.

The Court: Do they reveal any other abnormalities aside from fracture?

A. There were some arthritic changes.

The Court: And when were those taken?

A. Right the day of the injury.

The Court: Would X-rays that show arthritic changes taken at that date indicate that the arthritic changes resulted from trauma, or at least from that trauma, or from some other age or trauma?

A. Those changes were already present before the particular accident.

Q. (By Mr. Poore): Doctor, Miss Murphy has been under your exclusive medical care since the date of the injury? A. Yes.

Q. You have referred her to nobody?

A. Dr. Plett saw her for an ear ailment.

Q. But other than that you have been her attending and [148] treating physician?

A. Yes.

Q. Responsible for her recovery and care?

A. Yes.

Mr. Poore: We have no further questions.

(Testimony of Dr. Leo Fred Rotar.)

Redirect Examination

By Mr. Erickson:

Q. Dr. Rotar, Dr. Clemmons testified that in cases of injuries to the spine where there is a decrease in the lumbosacral joint following trauma, that except in the case of a rupture of the disc, X-rays taken immediately thereafter within a short time would not necessarily show the injury to the intervertebral disc, is that correct?

A. That's true.

Q. And your X-rays were taken, as I recall, all of them prior to September, 1958, is that your recollection of it? A. That is true.

Q. And if Dr. Clemmons took X-rays in November of 1958 and again in April of 1959, and they show a reduction in intervertebral spaces between vertebrae, would you assume that that would be perfectly normal, that is, that X-rays taken early would not show it, and X-rays taken later might show it, even though the injury occurred before you took the first X-rays, is that correct? [149]

A. You would have to assume that it was associated with the injury.

Mr. Erickson: That is all.

(Testimony of Dr. Leo Fred Rotar.)

Recross-Examination

By Mr. Poore:

Q. Let me ask one more question. Doctor, in the course of your treatment, have you seen any cause or necessity to take any more X-rays than were taken by you during the course of your treatment?

A. Well, I didn't order any more X-rays; the patient was progressing satisfactory. She had pain, and the headache was persisting, and she had still some loss of motion of the neck, and I took as many pictures as I thought were necessary.

Q. In other words, the particular treatment you were prescribing, the results were coming as you hoped for as as you believe was proper?

A. That's right.

Mr. Poore: No further questions.

Mr. Erickson: May I ask one further question?

The Court: That's the old system. Lawyers ask one more question and we'll be here until midnight.

Mr. Erickson: Your Honor, this matter of our——

The Court: Go ahead.

Mr. Erickson: There is one question I should have asked [150] other than that.

Redirect Examination

By Mr. Erickson:

Q. Dr. Clemmons talked about the headaches that now exist as characterized as a post concussion syndrome. Would that be a proper way of designating the existing headaches? A. Yes.

(Testimony of Dr. Leo Fred Rotar.)

Q. It means, in other words, they are a hang-over from the blow to the head?

A. From the original injury.

Mr. Erickson: That is all.

The Court: May the doctor be permanently excused?

Mr. Erickson: Yes.

The Court: Thank you, Doctor; that is all.

(Witness excused.)

The Court (Jury admonished): You are excused until Friday morning at 10:00 o'clock. Be back at that time. Court will stand in recess until that time.

(Whereupon, a recess was taken until Friday morning, April 17, 1959, at 10:00 o'clock a.m., at which time the following proceedings were had:)

The Court: Very well, call the next witness.

MARGARET ROSA

called as a witness on behalf of the plaintiff, being first duly sworn, [151] testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you please state your name?

A. Margaret Rosa.

Q. And will you speak up, Mrs. Rosa, so that everyone can hear you. And where do you live?

(Testimony of Margaret Rosa.)

A. At 209 West Boardman.

Q. And that is in the City of Butte?

A. Yes.

Q. And you are married, Mrs. Rosa?

A. Yes.

Q. How long have you lived at your present address? A. About 15 years.

Q. And how long have you lived in Butte?

A. All my life.

Q. And are you a sister of Mildred Murphy?

A. Yes; I am.

Q. And how far away from Mildred's house do you live? A. Oh, about three houses.

Q. And she lives on Montana Street, and you live on Boardman which intersects with Montana, is that correct? A. Yes.

Q. Now, over the years, have you seen a great deal of your sister, Mildred? [152]

A. I see her every day.

Q. Is there a considerable amount of visiting back and forth between you and Mildred?

A. Yes; there is.

Q. Does that also apply to the children?

A. Yes.

Q. How many children do you have?

A. I have five children.

Q. And the oldest? A. The oldest is 29.

Q. The youngest? A. 16.

Q. Now, calling your attention to the date June 24, 1958, do you recall having seen Mildred on that date?

(Testimony of Margaret Rosa.)

A. Yes; I was down home when my brother brought her in.

Q. Your brother is Frank? A. Yes.

Q. Mildred has testified that he is since deceased. A. Yes; he is.

Q. Now, will you tell the Court and jury where you saw Mildred, and describe her condition on that date?

A. Well, I was there when she came in. She came in screaming, complaining about her head, so I got her to bed right away, and then my brother went down and got the prescription that the doctor gave her, and I gave her the medicine as soon [153] as I could.

Q. Will you tell us about what time of day that was?

A. Well, it was around noon some time. I don't know just exactly what time.

Q. When you say your sister was screaming, would you say whether or not she seemed to be hysterical or dazed?

A. Yes; I think she was hysterical.

Q. Now, you put her to bed, is that right?

A. Yes; I did.

Q. Did you examine your sister at all at that time?

A. No; I got her to bed, that's all, tried to quiet her down and gave her her medicine, and she had the bump, this large bump right on the back of her head which worried me very much.

Q. You could see that? A. Oh, yes.

(Testimony of Margaret Rosa.)

Q. And when did you first notice that?

A. When she came home.

Q. Did she walk in unassisted?

A. Yes; she did. Oh, my brother was right close to her.

Q. But she was able to walk in? A. Yes.

Q. Will you describe the bump as to size and location?

A. It was quite large. It was about the size of your hand when you put your hand over it. It was quite large. [154]

Q. When you put your hand over it, would you say it filled your hand? A. Yes.

Q. Did you notice whether that bump changed any in say the first day, whether it got larger or smaller?

A. Well, I wouldn't say it got any larger, I couldn't say that, but it was there for about a week or more.

Q. How long did you remain at Mildred's house that first day?

A. I stayed all day and all night.

Q. And did you sleep in the same bed with her that night? A. Yes; I did.

Q. Now, will you tell the Court and jury just what Mildred's condition was during the day of the 24th of June, 1958?

A. Well, she was quite sick all that day. She was up and down. She couldn't stay in bed, and she couldn't stay up, she was terribly nervous.

Q. And she testified that she was nauseated and

(Testimony of Margaret Rosa.)

vomiting, did you observe that? A. Yes.

Q. Was that several times?

A. Oh, yes; she was that way for four or five days, I will say, all of that.

Q. Now, when she was up and down, what do you mean by up, what did she do when she got up? [155]

A. Well, she wasn't comfortable in bed, and she wasn't comfortable staying up.

Q. Now, the hysteria she had to begin with, did that pass away?

A. No; all that day she was like that. She would sleep a little while and then she would wake up crying and hollering about her head.

Q. What about that first night, could you tell us how much sleep she got?

A. She got very little.

Q. Did you, yourself, give her the prescription?

A. I followed the doctor's orders.

Q. Did you give her anything in addition to the prescription he had given her?

A. No; not the first few days.

Q. Now, what area was she complaining about most of the first day?

A. Her head; her head seemed to bother her and all in through her neck and shoulders.

Q. Now, was there any change on the second day?

A. Well, the second day she was pretty stiff. She said she ached all over.

(Testimony of Margaret Rosa.)

Q. Did she give evidence of that by the way she walked and that?

A. Yes; she did. It was hard for her to get out of bed. [156]

Q. And what about the second day; was that a day of up and down again? A. Yes.

Q. And what about the second night; were you there that night?

A. I stayed with her for two weeks. Those two first weeks were rough on her.

Q. Now, what about sleeping during the first two weeks?

A. She didn't sleep very good.

Q. And you were occupying the same bed with her; is that correct?

A. Yes, and I didn't get much rest either.

Q. Now, at the end of the first two weeks you quit staying there; why was that?

A. Well, I had to go home, and then my brother kind of took over.

Q. That's your brother, Frank?

A. Yes, and then my neighbor right next door, she took over.

Q. Is that Helen Kane? A. Yes.

Q. Had Mildred's condition improved substantially in the first two weeks?

A. Not too much, no.

Q. And during that two weeks, all of that two weeks, would you say her sleep was very much intermittent? [157] A. Yes.

Q. What about food, what food did she have in

(Testimony of Margaret Rosa.)

the first two weeks? A. Mostly liquids.

Q. Was she able to retain those?

A. At times.

Q. What about the vomiting and nausea, when did that end?

A. After the first week, that wasn't too bad.

Q. Did you accompany your sister, Mildred, to Dr. Rotar's office? A. Yes, I did.

Q. When was that?

A. On the following Friday, and from there on I went on all the trips with her.

Q. You went on all the trips to the doctor's office with her? A. Yes.

Q. Now, on the first trip you went to Dr. Rotar, do you recall whether or not X-rays were taken?

A. Yes, they took X-rays that day.

Q. And you were with Mildred in the doctor's office? A. Yes.

Q. How frequently did you go down to Dr. Rotar's office?

A. Well, I think she went down about once a week for awhile there. [158]

Q. Did you go with her every time?

A. Yes, I did.

Q. And how long did that period continue when you went once a week?

A. I think for over a month or more, I wouldn't say exactly because I'm not sure.

Q. Do you know that she has continued to go to Dr. Rotar since the time of the injury?

(Testimony of Margaret Rosa.)

A. Yes, she did up until a few weeks or a month ago.

Q. Do you know whether or not she is still under treatment by Dr. Rotar? A. She is.

Q. Now, after the first two weeks, will you tell the Court and jury what progress was made by Mildred insofar as recovery is concerned.

A. Well, Mildred had no ambition, she just lost all ambition. She wasn't able to do anything, and she complained about her back and her head continually.

Q. What about her nerves?

A. She was very, very nervous, and has been ever since, and she never was nervous before that.

Q. I will ask you about that in a moment, Mrs. Rosa. What about her housework, who did that?

A. She hasn't been doing it. I have been doing it and Mrs Kane. [159]

Q. And the housework consists of the preparation of meals for herself and now one brother, is that correct?

A. Yes. She does some of that, but no heavy housework.

Q. And what do you characterize as heavy housework?

A. Oh, washing windows, walls, scrubbing.

Q. And did she do that before June 24, 1958?

A. Yes, she did.

Q. Now, referring to the time before June 24, 1958, how long had Mildred lived at her present home? A. All her life.

(Testimony of Margaret Rosa.)

Q. That was the family home?

A. The family home.

Q. Now, before June 24, 1958, who did the housework? A. Mildred.

Q. And did that include this heavy work that you talk about? A. Yes, it did.

Q. Mildred is also interested in gardening, is that correct? A. Yes.

Q. And did she do that around the place before June 24, 1958? A. Yes.

Q. Now, did she do that in addition to her regular work as a waitress? A. Yes.

Q. And did you have to help her with those jobs? [160]

A. Well, when she was working I never helped her. She did all her own work.

Q. It wasn't until after June 24, 1958, that you started to help out on the work, is that right?

A. That's right.

Q. And Mildred has testified that your mother lived with her some years after your father died, is that correct? A. Yes.

Q. And in the last months of your mother's life, can you say whether or not Mildred did the housework at that time?

A. Mildred did the housework and worked besides and got very little rest.

Q. Now, what about Mildred's physical condition as you observed it before June 24, 1958, can you tell us generally what her physical condition appeared to be?

(Testimony of Margaret Rosa.)

A. Well, Mildred always had good health.

Q. Had you ever heard her complain about her neck or her back before that? A. No.

Q. Now, Mildred testified she had an operation in 1954. Was that connected in anyway with either her back or her neck? A. No.

Q. What can you say as to Mildred's working prior to June 24, 1958, can you say whether she worked regularly or not?

A. She always worked regularly all the time. She worked [161] steady.

Q. Now, you have mentioned Mildred's nervousness, and you said she was not nervous before June 24, 1958. Will you tell us a little more about that?

A. Well, Mildred was very calm, she wasn't a nervous person, but since this accident she is terribly nervous.

Q. What about her general attitude, can you say whether or not she was a cheerful person or not?

A. She was, very cheerful.

Q. And did your children visit with Mildred prior to June 24th?

A. They were with her all the time.

Q. And how did they get along?

A. Fine.

Q. I believe you told me that sometimes you wondered whether the children would rather be at your place or her place before the accident, is that correct?

A. I think they would rather be with her.

(Testimony of Margaret Rosa.)

Q. Now, what is the situation as to Mildred's nerves now?

A. Well, she is a little hard to get along with now, very cranky, very irritable.

Q. And does she give other indications of being nervous? A. Yes, she is terribly nervous.

Q. Can you see it?

A. Yes. She is just a different person [162] altogether.

Q. Before the accident, can you say whether or not Mildred was a person that liked to be on the go and visit and that sort of thing?

A. Yes, she did, she was always on the go.

Q. What about since the accident?

A. She doesn't do anything, you can't get her out of the house.

Q. And you would say she is no longer carefree as she was before? A. No, she is not.

Mr. Erickson: That is all. Wait a minute, Mrs. Rosa.

Cross-Examination

By Mr. Poore:

Q. You and Miss Murphy, as I understand, are sisters? A. Yes, sir.

Q. And you have lived there 15 years within three doors of your sister, as I understand it?

A. Yes, I have.

Q. And prior to that where did you live, Mrs. Rosa?

A. Well, I lived down home for awhile, and I lived a few years in Missoula.

(Testimony of Margaret Rosa.)

Q. Other than the few years in Missoula, you have lived with or near Miss Murphy all of her life? A. Yes, I have. [163]

Q. A close family relationship? A. Yes.

Mr. Poore: No further questions.

(Witness excused.)

HELEN KANE

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is Helen Kane?

A. Helen Kane.

Q. And where do you live?

A. 623 North Montana Street.

Q. And where is that with relation to the residence of Mildred Murphy?

A. We live right next door to one another. We share the one yard in back. Real close.

Q. How long have you known Mildred?

A. All my life, 42 years to be exact.

The Court: That's a new twist, isn't it.

Mr. Poore: Move it be stricken as not responsive.

Mr. Erickson: May I observe it's usually the ones that don't look it that will admit they are 42.

The Court: Very well done, Judge. [164]

Q. You are married? A. Yes, I am.

Q. You have children?

(Testimony of Helen Kane.)

A. I have a little girl three.

Q. Now, you have known Mildred Murphy, you say, all your life? A. All my life.

Q. And you are close friends?

A. Yes, very close.

Q. Now, calling your attention to the date of June 24, 1958, a date which the testimony shows Mildred Murphy suffered a fall at Safeway Stores, did you see Mildred on that date?

A. No, I didn't, but the next morning Frank came to our house and told my mother and I that Mildred was very sick and if I would go in, so I did immediately, and Mildred was in bed at the time, and as I went in she was nauseated, and I started to talk to her and she started to cry, and then she asked Margaret and I if we could help her to the bathroom which, with much difficulty, we did get her out of bed and into the bathroom, and she was terribly sick to her stomach. Then she came out in the kitchen and tried to sit down and she couldn't, so we took her back into bed again, and she laid across the foot of the bed. She didn't even get into bed, she wasn't able to.

Q. Why wasn't she able to?

A. She was in pain. [165]

Q. Could you see that she was in pain?

A. Yes, she was, she was in terrible pain, and she said that she was stiffening up, and she couldn't bend very well because she kind of fell sort of sideways, you know, half on and half off the bed,

(Testimony of Helen Kane.)

and Margaret and I helped her into bed then, and then——

Q. Not too fast.

A. I am sorry. And then I helped her—you know, I hadn't heard anything about it, so then they explained to me what had happened and——

Q. Don't give the conversation.

A. All right, and she complained about the pain in her head, and I separated her hair and looked at the bump and felt it and it was about that big (indicating) and it had a raise on it, and I really did look at that, and I stayed with her for about an hour and then I went back home, and then I went in again around three o'clock, and I stayed there about another hour, and then that evening I went in again and stayed with Margaret for about an hour, and then I had to go back home, and I saw her for four or five days afterwards steadily.

Q. Now, on that first day you heard Mrs. Rosa testify that Mildred seemed to be hysterical. Did you observe anything like that?

A. That day I went in she was crying, the first day I saw [166] her, she was crying then.

Q. And what about the succeeding days?

A. Well, I didn't see her then after that evening until the next day about, oh, about 11 o'clock in the morning, and she wasn't crying then, she had fallen asleep, and Margaret said she hadn't slept much during the night, but she had dozed off, so I didn't, you know, go in and disturb her.

Q. When did you next see her?

(Testimony of Helen Kane.)

A. Then I saw her that same day again in the afternoon.

Q. What was she doing then?

A. She was sitting in the kitchen and she was sitting sort of on the edge of the chair looking very uncomfortable, and then while I was there, she returned to bed because she started to get sick to her stomach again.

Q. And how frequently did you see Mildred then for the first few weeks?

A. Every day after that first day that I saw her, I saw her every day.

Q. And what did her condition seem to be during that first two weeks?

A. She complained of a throbbing pain in her head, and she was awfully stiff, she couldn't move around very well, and she had a pain right here (indicating) in her back.

Q. You are indicating the lower portion of the back now?

A. Yes, and also her shoulders, you know, right through this [167] area (indicating), she complained of a pain here, but of a throbbing pain in the back of her head.

Q. Now, after the first few weeks, how frequently did you see Mildred?

A. I see her every day.

Q. You go in and out of her house freely?

A. Oh, yes.

Q. Now, the testimony of Mrs. Rosa that you heard was that Mildred was not able to do her

(Testimony of Helen Kane.)

housework, and that between Margaret Rosa and you, you did a lot of the housework for her and have been doing it since her injury, is that correct?

A. Well, the first two weeks I didn't, but then Margaret went home, and since that time I have done all of Mildred's washing and ironing, and I did the inside of her windows for her, and I changed the linen on the bed for her, and at Christmas time, you know, I moved furniture and vacuumed and did all the heavy work.

Q. And why did you do it?

A. Well, she couldn't do it, she was unable to.

Q. And why do you say she was unable to?

A. Well, her back aches, she can't do much lifting, she is afraid to, she is afraid to do any lifting at all, and she was told to rest and take it easy.

Q. Now, what, if anything, have you observed about Mildred's sleeping habits since her [168] injury?

A. Well, she has told me time and time again that she had a restless night, that her head was aching, and I often said, "Well, why don't you try reading," and she said she tried it, but she couldn't because of this headache. She said if she reads just a few minutes, she gets so terribly dizzy that she would have to put the book down, and she tells me about getting up during the night, and in fact, our houses are so close, and her bedroom light does show a reflection in our room, and I see her light on three or four times if I happen to be awake, too.

(Testimony of Helen Kane.)

Q. Will you speak just a little louder?

A. I say our houses are so close that her bedroom light shows a reflection into my bedroom, and I have often seen her light on if I am up with the baby or with my mother.

Q. So that you were able to observe, in addition to what she has told you——

A. Yes, I see that light on.

Q. And has that continued right down to date?

A. Right as of now, it has.

Q. Now, what, if any, change did you notice in Mildred's nervousness or lack of nervousness, describe that?

A. Well, yes, we used to play Canasta together, you know, the families, and she no longer is interested in playing Canasta, and also we used to exchange magazines. She gives me the magazines, but she don't take any off of me, she isn't [169] interested in her hobby of reading any more, and she rarely goes to town. She used to love to go shopping and go visting. She rarely does that, and she used to take my little girl to town with her and care for her, in fact, she used to be my main baby sitter. She no longer does that. She is sort of melancholy.

Q. Would you say there is a marked change in her personality?

A. Oh, yes, she is worried because she is not working and there is no income in the family at all, and she is worried about that.

(Testimony of Helen Kane.)

Q. Now, you, since you are a neighbor, knew that Mildred worked steady before her——

A. She went to work right out of high school, I remember.

Q. What is that?

A. She went to work at Gamers right after she got out of high school.

Q. You know of your own knowledge that she worked there a good many years?

A. Yes, I used to make a lot of calls in there for my treats at Gamers when I was little. I remember she worked there for years.

Q. Now, in view of your close friendship with Mildred over the years, can you say whether or not prior to this accident she gave any sign of having discomfort in her lower back or her neck? [170]

A. No, she worked always and did her housework at home and cared for her mother, and she often helped me care for my mother when my mother was sick. We were always good neighbors.

Q. And she no longer does any of those things you detailed?

A. No, she doesn't. All she does is just her dishes and tidy up her table.

Q. From observing Mildred as you have, or Miss Murphy as you have, particularly in the last few months, does she give any outward sign of any discomfort?

A. Oh, yes, she is always doing this (indicating) to her neck, and I have asked her why and she said she felt like there was a weight on it.

(Testimony of Helen Kane.)

Mr. Poore: Just a minute, to which we object as a self-serving hearsay declaration.

The Court: Sustained.

Q. Tell us just what movements she makes?

A. Oh, well, she has a tendency to be always rubbing the back of her neck, and I have asked her why, and she——

Q. Now, don't tell what she said. Will you show the jury just exactly what movements you observed?

A. Well, she does this (demonstrating) all the time.

Q. And you are now indicating with your both hands that she puts them back of the lower part of her neck, and then arches her neck back, is that correct? [171]

A. Yes, she does, she pulls.

Q. When you say she pulls, what do you mean?

A. She stretches her neck, you know, like that (demonstrating).

Q. Does she give any other outward sign of any discomfort any other place than the neck?

A. Well, I have gone in there in the day time, you know, like I have, and I have seen her sitting with the heating pad on her back.

Q. Whereabouts?

A. On the lower part of her back, sitting on the davenport.

Q. Have you noticed whether or not Mildred in sitting any place changes her position frequently or infrequently? A. Yes, she squirms a lot.

Q. Did she do that before this injury?

(Testimony of Helen Kane.)

A. No, she used to sit and play Canasta by the hour, and she never used to be uncomfortable.

Q. You couldn't see that she was uncomfortable at that time? A. Oh, no.

Q. Now, Mrs. Rosa has testified that Mildred was of a calm personality prior to the accident. Have you observed that?

A. Oh, yes, she liked people. She worked among people all her life, she liked them and she was very at ease.

Q. What about now?

A. No, she has just withdrawn to herself. She doesn't care [172] to be around people very much. She is just sort of quiet and likes to be left alone.

Q. Have you noticed whether or not that situation seemed to arise shortly after the accident?

A. Well, I noticed it two weeks after, you know. First she was so sick that naturally I wouldn't expect her to want to be around anyone, but after that she seemed to want to be left to herself.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Poore:

Q. Mrs. Rosa—Mrs. Kane, have you heard any of the testimony previously to this in the case?

A. I have been here every day, yes, sir.

Q. You have been here in court throughout the trial? A. Yes, sir.

Q. Have you come to and from the trial with Mildred or Miss Murphy? A. Yes.

Mr. Poore: No further questions.

Mr. Erickson: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Erickson: I should now like to call Mr. Frazer as an [173] adverse witness.

WALTER C. FRAZER

called as an adverse witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. You are Walter C. Frazer, Manager of the Safeway Store on Granite Street?

A. Yes, sir.

Q. And did you hold that position on June 24, 1958?

A. Yes, sir, I did.

Q. How long have you been manager, Mr. Frazer?

A. About 17 years.

Q. Are you acquainted with Mildred Murphy?

A. I know Miss Murphy from coming in the store, yes.

Q. And can you say whether or not she was a regular customer of Safeway's prior to June 24, 1958?

A. Oh, she was in the store, well, quite often.

Q. Now, you were served with interrogatories by the plaintiff, were you not, with questions concerning this case?

A. Oh, yes.

Q. And the answers to those interrogatories, the

(Testimony of Walter C. Frazer.)

answers to those questions, were your answers, were they not? A. That's right. [174]

Q. And in your answers to the interrogatories, you gave the names and addresses of people who were employees of the Safeway Store on Granite Street on June 24, 1958, is that correct?

A. Yes, sir.

Q. In your answer to Interrogatory No. 3, you were asked in that interrogatory, "Did any of the employees of the defendant observe the plaintiff Mildred Murphy fall in the described store on June 24, 1958," and your answer to that was, "No employee saw the plaintiff fall," is that correct?

Mr. Poore: To which we object as a leading and suggestive question.

Mr. Erickson: I have him on cross-examination, your Honor.

The Court: Well, yes.

Mr. Poore: Improper use of interrogatories.

The Court: Well, yes, I don't think you have to base it upon the interrogatories, just ask him, and——

Mr. Erickson: It seemed to me that was the easiest way to ask the questions.

The Court: It might be, but I think that possibly you should just proceed to examine the witness. The testimony is what he says here on the stand.

Mr. Erickson: Very well, but I assume I may ask leading questions as on cross-examination.

The Court: Yes, yes, and you may use the

(Testimony of Walter C. Frazer.)

answers to the [175] interrogatories for whatever other purposes they may serve in the course of your examination.

Mr. Erickson: The only purpose in asking leading questions would be to speed it up.

The Court: Sure.

Q. Is it true that those who assisted Miss Murphy after the fall were Walter C. Frazer, Thomas R. Hart, Fred A. Stromseth, Albert Squires and Rose Ledingham? A. That's right.

Q. And were there any others assisted her besides those? A. Not to my knowledge.

Q. Who took Miss Murphy to the hospital, if you know? A. Rose Ledingham.

Q. And she was then an employee of Safeway?

A. That's right.

Q. Do I understand that she is no longer employed at your store? A. She isn't.

Q. What is the floor covering on the Safeway Store on Granite Street? State particularly as of June 24, 1958. A. A type of asphalt tile.

Q. Is that the covering that is still on the floor?

A. The same, yes, sir.

Q. What is the practice of your store as far as cleaning the floor is concerned? [176]

A. Well, it is scrubbed by water and soap and then waxed.

Q. And how frequently is that done?

A. That is done twice a week, Monday and Thursday nights.

Q. Now, was the floor scrubbed with soap and

(Testimony of Walter C. Frazer.)

water and waxed on the night of Monday, June 23, 1958? A. Yes, it was.

Q. And who did that? A. Leo Rodoni.

Q. Have you yourself observed Mr. Rodoni when he does this work? A. I have.

Q. Will you tell the Court and the jury what the scrubbing with soap and water consisted of?

A. Well, it is just a damp mop and it is thoroughly dried and then he applies the wax.

Q. When he scrubs it, what does he scrub it with? A. A cotton mop, a hand mop.

Q. He doesn't use a brush? A. No.

Q. Or a power brush?

A. No, it's a mop, a regular cloth mop.

Q. What kind of soap does he use, do you know?

A. It's a Waxcraft all purpose soap.

Q. Is that a product sold by Safeway Stores?

A. We don't sell it, no, it is used by Safeway, by the chain. [177]

Q. But it is not one of the products you have for sale? A. It's not for sale, no.

Q. Now, what kind of wax is used?

A. A Waxcraft wax.

Q. And is that product sold by Safeway?

A. That isn't sold by Safeway.

Q. Is this a paste or a liquid wax?

A. It is a liquid wax.

Q. Now, you have for sale in your store waxes, do you not? A. Yes, we have.

Q. Would you recognize this can marked Plain-

(Testimony of Walter C. Frazer.)

tiff's Exhibit 7 for identification, and bearing a price of 69 cents on the top of it, and the name on it is Aero Wax, as one of the products sold in your store here, Safeway? A. Yes.

Q. And would you be able to identify it as having been actually purchased at your store by the sign on it?

A. Well, no, I couldn't because all five stores use the same type stamp.

Q. If I were to say to you that I purchased that this morning at your store, would you think that could be possible?

A. It would be possible.

Mr. Erickson: We offer Plaintiff's Exhibit No. 7.

Mr. Poore: It is objected to as incompetent, irrelevant and immaterial to any issue in this case. [178]

Mr. Erickson: I will connect it up a little further, your Honor.

The Court: Very well.

Q. You do not sell Waxcraft in your store, is that correct, the wax that's used?

A. Not the wax that we use on the floor, no.

Q. Is there some reason why that's not sold at the store? A. I really don't know

Q. Do you have any idea why you use a product not sold at the store instead of a product you sell at the store?

A. Well, it has been tested by the chain, and as I understand, is used by 90 per cent of the stores

(Testimony of Walter C. Frazer.)

in the chain, and it has proved itself to be the wax that they wanted.

Q. Now, this Aero Wax is advertised as one that saves rewaxing, indicatingt that it lasts a long time. Can you say whether or not, of your own knowledge, Waxcraft is used because it lasts even longer than Aero Wax?

A. No, I wouldn't say that. With the traffic in the store the wax doesn't last long anyway, probably a day or two.

Q. Can you say from your own experience whether or not liquid wax self-polishing lasts longer than the paste waxes? A. I couldn't say.

Q. Are you familiar with your wax products?

A. Slightly.

Q. As a matter of fact, as manager over there for many years, [179] you know your own products pretty well, don't you?

A. Well, we have changed brands off and on.

Q. In addition to Aero Wax you sell Johnson's, do you not? A. Johnson's, yes, sir.

Q. And something called Stride?

A. Stride, a Johnson product.

Q. That's a liquid wax? A. It is.

Q. And is Simonize liquid?

A. There is a Simonize wax, and I believe it is a liquid, yes, it is.

Q. And you would assume that none of the products which you sell in the store because Glasscraft—what is the name of it? A. Waxcraft.

Q. Because Waxcraft is a longer lasting wax,

(Testimony of Walter C. Frazer.)

is that correct? A. I wouldn't say that.

Q. You don't know? A. No. I don't.

Mr. Erickson: We offer Exhibit 7 again.

Mr. Poore: We renew our objection to the offer as incompetent, irrelevant and immaterial to any issue in the case.

Mr. Erickson: We believe it is, your Honor, because there is an issue in this case, or will be, whether wax builds [180] up.

The Court: Yes. I'll overrule the objection and admit the exhibit.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Poore: What is the number on that, Leif?

Mr. Erickson: 7.

Q. I will show you another can, it has written on it "Clean Floor," marked for identification as Plaintiff's Exhibit 8, and I'll ask you if that's a product that's sold at your Safeway Store? A. Yes.

Q. Now, so the record will be clear, if I were to tell you I purchased this at the Safeway Store at Helena rather than here, and with the mark on it, you would assume that it was sold by Safeway?

A. I assume that, yes.

Q. Now, this product, the advertising on it says that it is a wax remover and cleaner, and you would be familiar with it as such a product?

A. I wouldn't know what it could do, I mean I have never seen it used.

Q. The store sells it, though?

A. We sell it, yes, sir.

(Testimony of Walter C. Frazer.)

Q. Do you sell any other wax remover?

A. I believe that is the only one we have. [181]

Q. Now, was that product used, or has it been used, in cleaning your floor at Safeway?

A. No; it hasn't.

Mr. Erickson: We offer Plaintiff's Exhibit No. 8.

Mr. Poore: Again we object as incompetent, irrelevant and immaterial to any issue in this case; it doesn't prove or tend to prove any issues of the case.

The Court: Overruled; it is admitted.

(Plaintiff's Exhibit No. 8 received in evidence.)

Q. Now, prior to the night of June 23, 1958, can you tell me for how long the practice existed of waxing the floor at Safeway twice a week?

A. Oh, I would say 10 years, 12 years.

Q. And do you know of any time, and particularly limiting yourself to, say, the six months before June 23, 1958, when any product was used similar to Wax Off to remove all of the wax from the floor?

A. No; I don't.

Q. Do you know of any scrubbing or——

A. Scraping.

Q. Scraping?

A. That is, in any built up area like against the display itself.

Q. So that on the edges of the walking surface in any aisle, there is a tendency for the wax to build up, is that correct? [182]

(Testimony of Walter C. Frazer.)

A. That's right.

Q. When was the wax that had been built up last scraped and removed prior to June 23, 1958, if you know?

A. Well, I would say approximately, well, it is only a guess, it would be around two months, that would be close.

Q. After the waxing is completed, is there any polishing of the wax surface?

A. There isn't any polishing, no.

Q. Is that because it is self-polishing wax that is used? A. That's right.

Q. Does the floor take on a sheen or a shine after the floor has been waxed?

A. It takes on a clean look, I would say.

Q. Does it reflect light?

A. Well, it shines slightly.

Q. Now, I have observed in going into your store, Mr. Frazer, that the tile is pretty much worn at the immediate entrance, and that there are places where the concrete shows through, but that when you get down into the aisles, the tile seems to be in much better shape, is that a correct statement of the condition there? A. I would say it was.

Q. And that would indicate to you that where the heavy traffic is toward the front, there is greater wear there, is that true? [183]

A. That's right.

Q. And would you say from that that you would expect when you came into the store that after waxing probably those worn areas probably wouldn't

(Testimony of Walter C. Frazer.)

have the sheen or shine that the unworn areas have, would that be true?

A. Well, directly right by the door that would be true. The worn spot is right by the door.

Q. Well, I had noticed several of them this morning. You have seen this very crude drawing?

A. Yes.

Q. And assuming that that rail comes out to here (indicating)—I have got these things out of proportion, as you know—

A. Yes.

Q. Everyone coming into the store, to get any place in the store, when the check stands are occupied, must go down that route, is that correct?

A. The same route that you pointed out yesterday, you mean?

Q. Yes.

A. Or Thursday. No; most of them come around by the—towards the east, or the west part of the building to go through the produce itself.

Q. Well, yes, we are talking about the same thing. When you come into the store, you come in through the door which is to the east side?

A. That's right. [184]

Q. And the way to get into the store is to turn to your left and go west to the produce counters, is that right?

A. That's right.

Q. And then turn and go through past this rail (indicating), and then go to any aisle you want to?

A. Yes.

Q. In fact, they could go around to the south of the produce counter, could they not, or is that right

(Testimony of Walter C. Frazer.)

up to the window? A. They go both ways.

Q. So that the greater wear on the floor would be in this area I have designated here with broken lines, is that correct? A. Probably, yes.

Q. And if I said that one worn spot is in the center of traffic about opposite the third check stand from the east wall, would you say that would be about where the concrete shows through?

A. Directly inside the door?

Q. Yes. A. That's right.

Q. It would be to the left of the door?

A. That's right.

Q. And if I said there were also some holes and patches next to the window up front, about the center of the window, do you recall that there are such holes or patches? [185]

A. There is one small one where the turnstile had been removed.

Q. That is what that is? A. Yes.

Q. Now, when you get around this corner and start this way (indicating), can you say whether or not the aisle, and particularly the aisle in front of the fruit and produce stand, whether the tile is in better shape there than it is in this main traffic-way? A. It is in a little better shape.

Q. Now, Miss Murphy was a little indefinite as to the exact location of the various counters, and probably because she was looking at my drawing. The produce counter is rather wide, isn't it?

A. Yes; it is.

Q. And the way it sits, if you were looking in

(Testimony of Walter C. Frazer.)

from the window, it would block the view of the second aisle from the west wall, would it not?

A. Yes, sir; about half way, I imagine.

Q. So if you wanted to go into this aisle which I show on the map, the only aisle I show, or really this is supposed to be the display case, you would come by this produce counter, and you would turn slightly to the left, would you not, to get into that aisle? A. Just slightly, yes. [186]

Q. And the distance from the rail back of which the carriages sit to the produce counter would be approximately what?

A. You mean the width of the aisle?

Q. Yes; in front of the produce counter.

A. Oh, I would say about three feet, three and a half feet.

Q. Now, the purpose of having the produce bin right there is to draw the attention of the customers to it, isn't that correct?

A. Well, that's part of the reason, yes, sir.

Q. And you make every effort as manager of the store to have attractive displays to catch the eye of the customers, isn't that true?

A. That's true.

Q. And you have specials advertised most every day, do you not? A. Every day.

Q. And you do that with the hopes that a customer comes in to buy a pound of coffee and comes out with \$10 worth of groceries, isn't that right?

A. We hope.

Q. I would say at Safeway in Helena when I

(Testimony of Walter C. Frazer.)

do the shopping, which occasionally happens, they have great success. I have even come out with half a beef when I went in for a pound of coffee. And would you say that on June 24, 1958, the usual [187] condition existed, you would have had eye catching displays? A. I imagine so.

Q. Miss Murphy testified there was an attractive display of bananas on the produce counter, and she had intended, if she completed her mission, to buy some. Would that probably have been the case, that there would have been bananas on display there?

A. They would have been out, yes, sir.

Q. Now, the coffee counter, or the coffee display generally is on the west side of the display rack adjacent to the aisle which was partly blocked, so far as view is concerned, by the produce counter, is that correct? A. On the west, facing west?

Q. Yes. A. Yes.

Q. And was that the condition on June 24, 1958?

A. I believe it was.

Q. Now, you observed Miss Murphy after she had fallen, is that correct?

A. After. She was on her feet when I got up there.

Q. And where was she with relation to the produce counter when you saw her?

A. She was right, I would say, two feet north of the produce counter.

Q. So that she would be—— [188]

A. At the beginning of the aisle there.

Q. The beginning of the aisle that has the little

(Testimony of Walter C. Frazer.)

Q. jog in it, is that correct? A. Yes.

Q. You arranged to have Miss Murphy taken to the St. James Hospital?

A. I asked Miss Murphy if she would like to go down to the hospital and be checked, and she said yes, so that's when I had Rose Ledingham take her down.

Q. Did you observe Miss Murphy's physical condition at that time?

A. Well, she was quite upset and she complained of her head.

Q. Did she show you the back of her head?

A. She had me feel the bump.

Q. And could you feel it? A. I could.

Q. Did you have any conversation with Miss Murphy within a month after this accident concerning a claim to be filled out by her?

A. I don't recall.

Q. Was there any conversation in which you indicated you would report the accident and prepare a claim for her?

A. No; I don't recall having said anything to Miss Murphy about it, but we do that right after an accident. [189]

Q. And did you do that in this case?

A. Yes, sir.

Q. Have you received reports of other persons falling in your store on Granite Street prior to June 24, 1958?

Mr. Poore: To which the defendant objects upon

(Testimony of Walter C. Frazer.)

the ground and for the reason there is no specification of time; it doesn't show whether it is remote or relevant.

Q. I will make the question within three years prior to June 24, 1959.

Mr. Poore: To which the defendant objects as being too remote as to time and improper.

Mr. Erickson: I do not propose, your Honor—I do not believe I have the right to go into detail as to who fell and what the reason was and—

The Court: No, but I think you would have to show that the conditions were approximately the same during that period that you are inquiring of.

Mr. Erickson: I have the question in mind for another reason, your Honor, and that's on a foundation for my proposed instruction on *res ipsa loquitur*, based on the assumption that ordinarily people would not fall.

The Court: Well, that's a different matter, but if you will ask some questions with reference to the conditions over the period of time that you are concerned about, I will admit it.

Q. Did you have any—strike that— [190]

The Court: Were the floors and conditions that existed over that period the same as existed on the 24th of June?

Mr. Erickson: I thought I had largely established that.

Q. Were the conditions of the floor as of June 24, 1958, and particularly with relation to the area in front of the produce counter, approximately the

(Testimony of Walter C. Frazer.)

same on that date as they had been for the three preceding years?

A. I would say approximately, yes, sir.

Q. And what about the whole store? Would you say the floors were in about the same condition in 1958 as they had been for the preceding three years?

A. I would say yes.

Q. And was the practice as to cleaning and waxing the same for the three years that you have already indicated? A. Practically.

Q. Now, did you have reports of falls in the store by persons within the three-year period immediately prior to June 24, 1958?

Mr. Poore: To which the defendant objects upon the ground and for the reason there is no indication that the fall would be of a similar nature, whether it would be tripping over produce or the turned ankle type of fall, or stepping on lettuce leaves, or what type of fall it would be, and consequently it would be misleading to the jury, incompetent, irrelevant and immaterial. [191]

Mr. Erickson: It may be, your Honor, and as far as I am concerned, I don't care whether the testimony is that nobody fell or somebody fell, because my reason for asking the question is on the doctrine of *res ipsa loquitur*.

The Court: Well, ask the question with reference to just slipping on an open floor.

Q. Okay. Have you had reports of anyone slipping and falling on the floors, and I distinguish be-

(Testimony of Walter C. Frazer.)

tween someone tripping over grocery boxes or slipping on banana peels.

A. I believe there was one prior to that.

Q. Can you say whether or not that occurred on a day following a waxing the preceding night?

A. I couldn't say.

Q. Do you recall about the date of that?

A. I think it was about six months before.

Q. And do you know who the person was?

Mr. Poore: Again we object as incompetent, irrelevant and immaterial to any issue in this case.

The Court: Overruled.

A. I am not quite sure of the name. I believe it was Harrington.

Q. Would it be a Mrs. Helen M. Harrington, is that the person you think it might have been?

A. I am not certain I know the last name. I believe the last name was Harrington. [192]

Q. Now, since June 24, 1958, have you had any reports of a slip and fall not occasioned by tripping or stumbling in your store?

A. I believe that—I am not certain, but I think there was one fall of some kind afterwards.

Q. Would that have been a Mrs. Mary Antonovich? A. Yes; it would have been.

Q. Do you recall whether that was on a Tuesday or a Friday? A. That I don't recall.

Mr. Erickson: That's all.

(Testimony of Walter C. Frazer.)

Cross-Examination

By Mr. Poore:

Q. Mr. Frazer, in the three-year period to which you have been referring, how many persons, or how many sales have you had in your Safeway Store in three years before June 24, 1958?

A. Well, approximately 850,000.

Q. When you say a sale, what do you mean by a sale?

A. That's one transaction; one customer.

Q. Would that necessarily be one person?

A. Well, most of the time it would be.

Q. Could it involve two persons, for example, a husband and wife?

A. It could be. [193]

Q. Or more persons?

A. Or more, yes.

Q. So that in the three years prior to the happening of this accident there was, what did you say, 800,000 sales?

A. Over 850,000.

Q. Now, since that time, since June 24th, up until the present time, do you know approximately how many sales you have had in that store?

A. I would say over 200,000.

Q. And would the same situation obtain in that, there again you are referring to individual transactions?

A. That's right.

Q. Now, as to the two persons that were referred to there in direct examination, did either of those persons make any claim that their slipping and falling was Safeway's fault?

A. To my knowledge, no.

(Testimony of Walter C. Frazer.)

Q. Now, calling your attention to the aisleway there near where Miss Murphy was found lying down or had fallen, is the area in that portion of the store well traveled? A. Oh, it is.

Q. Are there also worn spots there on the asphalt tile? A. Yes; there would be.

Q. Is this exhibit, those exhibits, are those industrial wax, those exhibits that have been introduced, the one exhibit, the wax, is that industrial wax or home wax? [194] A. Home wax.

Q. The wax that was used in your place of business, what kind of wax was that?

A. I would say that was industrial wax.

Q. How many Safeway Stores is that used in?

A. I believe 90 per cent of the system uses it.

Q. How many stores in the system?

A. About 2,100.

Q. So approximately 90 per cent of 2,100 stores use the same system of washing and waxing that you use? A. Yes.

Mr. Poore: We have no further questions.

Redirect Examination

By Mr. Erickson:

Q. In distinguishing between an industrial wax and a home wax, would you think, Mr. Frazer, that an industrial wax would be heavier and would last longer than a home wax?

A. It is a heavy duty wax, that's all I know.

Q. Would you assume since you have distin-

(Testimony of Walter C. Frazer.)

guished, you said it was industrial as compared to a home wax—— A. It could be.

Q. An industrial wax would be one that would stay on the floor with heavier traffic than a home wax, is that correct?

A. I believe so, yes. [195]

Q. Is there any reason why you don't wax oftener than twice a week?

A. No; that seems to be sufficient. The floor holds up fairly well that way.

Q. So that the wax at least lasts for the three or four days, is that correct?

A. It holds fairly well, yes, sir.

Q. There was one question I omitted to ask you about the amount of wax used. What's the amount used on a waxing?

A. I would say about, oh, probably a little better than a quart.

Q. And does that come in a large five-gallon container or something like that?

A. Yes, sir; it does.

Q. Now, you, yourself, were not present when the floor was waxed on the night of Monday, June 23, 1958, were you?

A. I had to come back and leave the gentleman out of the store.

Q. He does that during the night?

A. Yes, sir.

Q. What time does he finish up?

A. Oh, approximately 8:30.

Q. But you would have no way of knowing of

(Testimony of Walter C. Frazer.)

your own knowledge whether he used a quart or more or less?

A. No; I just assume from ordering that that is what it would [196] amount to, a little better than a quart.

Q. He was doing the waxing and cleaning in accordance with your instructions, is that correct?

A. Well, the instructions that go along with the product.

Mr. Erickson: That is all.

Mr. Poore: No further questions.

(Witness excused.)

The Court (Jury admonished): Court will stand in recess until quarter after 11.

(Ten-minute recess.)

Mr. Erickson: I should like permission to recall Mildred Murphy for a few questions.

The Court: All right.

MILDRED MURPHY

the plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Miss Murphy, you have already testified, and there are a couple questions that I overlooked asking you. You heard Dr. Rotar's testimony yesterday? A. Yes; I did.

(Testimony of Mildred Murphy.)

Q. And that of Dr. Clemmons?

A. Yes; I did. [197]

Q. Now, you saw Dr. Rotar for the first time on June 24, 1958, is that correct?

A. That day?

Q. Yes. A. Yes.

Q. Have you fallen since that time?

A. No; I haven't.

Q. Have you been involved in any accident since that time? A. No; I haven't.

Q. No automobile accident?

A. No; I haven't.

Q. Have you suffered any injuries since that date?

A. Besides the ones that I have, no.

Q. Do you have any income, Miss Murphy?

A. No; I always supported myself.

Q. Have you had any income since June 24, 1958? A. No.

Q. Do you have any stocks or bonds or anything? A. No; I haven't.

Q. So that you are solely dependent upon your earnings, or have been for your living?

A. Yes; I am.

Q. Now, you have testified that you have a brother living with you. Does he give you any money?

A. Well, he isn't working right now. [198]

Q. What is his occupation right now?

A. Laborer, and it is not very good in Butte right now, labor conditions, construction labor.

(Testimony of Mildred Murphy.)

Q. And what about his health, is he able to work steady when he does work?

A. Sometimes, but he isn't feeling any too good now.

Q. Now, Mr. Poore gave a list of restaurants that he asked you about whether or not they had closed. Are you familiar with those restaurants he named?

A. Just by name. I don't believe I was ever in any of them. Some of them I wouldn't go in. I know I wouldn't work in some of them.

Q. Are they smaller—

A. Smaller restaurants. I worked in the better, bigger houses.

Q. Can you say whether some of them are in neighborhoods where you would prefer not to work?

A. Yes, sir.

Q. They do employ some waitresses, don't they?

A. Oh, yes.

Q. So that their closing would mean that some waitresses would be out of work as a result?

A. Yes; there would be some out, yes.

Mr. Erickson: That is all.

Mr. Poore: No cross-examination.

(Witness excused.) [199]

Mr. Erickson: And with that, the plaintiff rests.

Mr. Poore: May it please the Court, we have a motion to address to the Court.

The Court: Very well. (Jury admonished.) You

are excused until 1:30, be back at 1:30. Kindly leave the Courtroom now.

(Jury leaves the Courtroom.)

Mr. Poore: May it please the Court, I would like to make an oral motion.

The Court: Yes.

Mr. Poore: Comes now the defendant, Safeway Stores, Incorporated, at the close of the plaintiff's evidence and after the plaintiff has rested her case in chief, and respectfully moves the Court to dismiss this action upon the following grounds and for the following reasons:

First, there is no evidence whatsoever that the defendant's store in question was negligently maintained or was in an unsafe or dangerous condition at the time of the accident in question, or that the defendant did not use ordinary care to keep its premises reasonably safe for its customers, including the plaintiff herein.

Two, that there is no evidence whatsoever that the defendant failed to use due care in the selection and application of the wax to the floor.

Three, that the doctrine of *res ipsa loquitur* is not applicable. [200]

Four, there has been no proof whatsoever as to any one or more acts of specific negligence upon which the plaintiff can predicate any inference favorable to her alleged cause of action. [201]

* * *

WALTER C. FRAZER

called as a witness on behalf of defendant, having previously been sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name again, please, to the Court and jury.

A. Walter Frazer.

Q. For the purposes of the record, you are the same Mr. Frazer who has testified heretofore?

A. That's right.

Q. You just testified this morning?

A. Yes.

Q. Where do you live? [231]

A. 1134 West Park in Butte.

Q. How long have you been a resident of Butte?

A. Most of my life.

Q. Are you married? A. Yes; I am.

Q. Have a family? A. One daughter.

Q. How old is your daughter, Mr. Frazer?

A. 18.

Q. Pardon me? A. 18 years.

Q. Is she attending local schools?

A. She goes to Carroll College in Helena.

Q. How long did you state you had been with Safeway Stores? A. 25 years.

Q. In what capacities, Mr. Frazer?

A. Clerk and manager.

Q. How long have you been associated with the present store where you are manager?

A. Two years.

(Testimony of Walter C. Frazer.)

Q. And at any prior time had you worked in that store?

A. I worked there one year at the opening about 20 years ago.

Q. How long ago did it open?

A. I would say about 20 years.

Q. And what is your capacity down there at the store at the [232] present time?

A. Store manager.

Q. And as store manager, are you the top man down there, so to speak?

A. I imagine that would be it.

Q. Now, during this period of 20 years that you have referred to that the store has been located there, has it been open for business?

A. Pardon?

Q. Has it been open for business during that period of 20 years? A. Yes; it has.

Q. In constant use? A. Yes; it has.

Q. Has there been any substantial change in the layout of the floor and the floor covering in those 20 years?

A. The floor covering, I imagine, has stayed pretty much the same, although the store has been changed.

Q. What is the floor covering?

A. Asphalt tile.

Q. Do you know when that was laid, or approximately how old it is?

A. Well, unless it has been changed from time

(Testimony of Walter C. Frazer.)

to time in different spots, it has been laid, as I say, 20 years.

Q. Now, would you describe what that asphalt tile is? [233]

A. Well, it is an asphalt with a top coating of various colors.

Q. And what size squares or what size pieces is that laid in, approximately?

A. Oh, I would say 9 by 9.

Q. And is the entire floor so covered?

A. That's right; all the sales floor, that is.

Q. Would you describe that floor to the Court and to the jury, the entire floor area, as to whether it has any unlevel portions or what the fact is about it?

A. No; I would say it is fairly level.

Q. And how about being smooth or rough?

A. Well, there is some of it is a bit rough, but it's mostly smooth.

Q. The rough areas you refer to, are those the areas you testified to earlier today where you said they had been worn? A. That's right.

Q. Would you describe to the Court and jury what the lighting system is?

A. I believe the lighting is very good.

Q. Well, what kind of lighting does it have?

A. It is all ceiling tube lighting, and it lights the store, I think, very well. We also have lighting, excuse me, also lighting around the sides of the walls, too. [234]

Q. In your testimony this morning, you referred

(Testimony of Walter C. Frazer.)

to a system of maintenance of the floor. Now, were you then referring to this asphalt tile floor as to which you have just testified? A. Yes, sir.

Q. Now, what maintenance is that that's carried out there at the store, and referring more particularly to on or about June 24, 1958, what was the maintenance system?

A. Well, the scrubbing and waxing twice a week, Mondays and Thursdays.

Q. Would that be in the morning, afternoon or night, or what is the fact?

A. All done at night after closing hours.

Q. What are the regular store hours down there?

A. Store hours are from Monday through Thursday, from 9:00 to 6:00. We usually open at 8:00, and Friday and Saturday are 9:00 until 8:00.

Q. Who is in charge of the maintenance of the floors, or more accurately at that time who was in charge? A. Leo Rodoni.

Q. Is he still in charge?

A. He is still in charge.

Q. Now, I believe you said that the floors are washed and then they receive a treatment?

A. That's right.

Q. Now, what is the purpose of this system of floor maintenance? [235]

A. Well, in washing it—is that what you mean?

Q. Well, both operations, why do you do that?

A. Well, the scrubbing is to take the dirt off the floor, of course, and then the wax is applied, well for cleanliness, and it's really easy for us to

(Testimony of Walter C. Frazer.)

handle—well, dust is our big problem, and this here solves a lot of that. It is easier to maintain the floor when it is waxed.

Q. It keeps down the dust?

A. Yes; it does.

Q. Are goods for sale, various fruits and vegetables on the display counters?

A. That's right; they are all in the open and it is very essential that the floor should be clean.

Q. Now, directing your attention to the date of the accident, namely, June 24, 1958, what time were you opened on that morning, what time did people start arriving?

A. Well, I was there at 8:00, and we opened the doors. At that time we are serviced by our bread and milk and cookies, cakes, and so forth, between the hours of 8:00 and 9:00, so, therefore, the door is open and we do receive quite a few customers.

Mr. Poore: Would you have any objection to my withdrawing this witness?

Mr. Erickson: None at all. [236]

The Court: Do you think it is necessary to put the witness on? Have you had a look at the pictures, have you seen them?

Mr. Erickson: No.

The Court: Just submit them to counsel, and we may not have any problem.

Mr. Erickson: May I consult with my client?

Mr. Poore: Yes.

Mr. Erickson: May I ask this witness a question or two?

(Testimony of Walter C. Frazer.)

The Court: Yes.

Mr. Erickson: Have you seen these pictures, Mr. Frazer?

A. No; I haven't.

Mr. Erickson: May I ask if this is about the way it looked on June 24, 1958, that is, looking back toward the front of the store?

A. That is from here up to here (indicating).

Mr. Erickson: Yes.

A. That is approximately it.

Mr. Erickson: Look at the next one now.

A. The only thing here, there was a rounded end display which was removed since. Outside of that——

Mr. Erickson: I have no objection if you want to offer the pictures as they are.

The Court: Very well; have them marked.

Mr. Poore: Defendant offers in evidence Defendant's Exhibits 9 through 12, inclusive. [237]

Mr. Erickson: Have you offered those?

Mr. Poore: Yes.

Mr. Erickson: I have no objection, except I understand from the witness, Mr. Poore, that the corner on the produce counter—I don't think that it is significant—was rounded in 1958, and it is now square, and except for that I understand it is the same, and I have no objection.

The Court: Very well, they are admitted.

(Defendant's Exhibits 9 to 12, inclusive, admitted.)

(Testimony of Walter C. Frazer.)

Q. (By Mr. Poore): Mr. Frazer, calling your attention to Defendant's Exhibit No. 11, I will ask you if that exhibit shows the entrance to the store on Granite Street, or the edge of the entrance to the store on Granite Street?

A. It doesn't show the entrance or the front part.

Q. Does it show the area immediately adjacent to the entrance on Granite Street?

A. It shows the aisle after the turn, which is right here (indicating).

Q. I call your attention to the left edge of the picture, does that show the entrance, the store entrance on Granite Street?

A. No; the door is swung to the left.

Q. Would you mark with this grease pencil where the door is by indicating by an arrow?

(Witness does as requested.) [238]

Q. And how far to the left in the direction of that arrow would the door be, Mr. Frazer?

A. It would be directly off the side there.

Q. How far?

A. I would say about a foot.

Q. About a foot away from where the arrow is. Now, there has been some testimony in the case of the route of the patrons of the store from the entrance through the store to the area of the coffee counter, as it then existed. Does that picture show that route generally?

(Testimony of Walter C. Frazer.)

A. It shows a portion of it, down the aisle by the vegetable stand.

Q. Would the other portion also be along these windows along Granite Street?

A. That's right.

Q. Would you describe how a person coming into your store would have traversed the area of that picture, taking the route that Miss Murphy described that she took?

A. Well, they would come in the door facing north, walk in towards the north, walk west——

Q. Would you mind stepping down and explaining this to the jury so they can see what you are describing?

A. They would enter the door here (indicating)——

Q. And by "here," you are referring to the arrow you made on the exhibit? [239]

A. That's right, and follow west to the end of the check stands, then make a right turn and down the aisle here to approximately here (indicating).

Q. And by "here," is the other extreme of the picture opposite the arrow? A. Yes.

Mr. Erickson: May I ask a question on that picture?

Mr. Poore: Yes; you certainly may, Mr. Erickson.

Mr. Erickson: This that you see is the back of the check stand, is it not? The picture is taken looking toward the back of the stands?

A. Yes; these are the backs of the stands.

(Testimony of Walter C. Frazer.)

Q. (By Mr. Poore): Now, would you please take a look at Defendant's Exhibit 12, and state what that picture shows?

A. Well, that is the end, or part of the aisle that was just mentioned, plus the end of the produce display.

Q. Now, was that produce display rack in the same condition on June 24, 1958, as that picture display is now? A. No; it wasn't.

Q. Was the floor just the same?

A. It was the same measurement, I mean the end would come to the same spot, but there was a rounded end display which was removed, and the full display was pushed north three feet to pick up room in the front.

Q. Am I correct in this, then, Mr. Frazer, that it would [240] occupy the same place as this display counter, but had a rounded corner?

A. That was the only difference.

Q. Any difference in the floor as shown there and at the time of June 24, 1958?

A. I can't see that there is.

Q. Now, does this particular exhibit show the area of where Miss Murphy was found?

A. A part of it, right here (indicating).

Q. By "here," you put your finger—

A. Right at the entrance, I would say right here (indicating).

Q. Would you put a circled "1" there with the grease pencil?

(Testimony of Walter C. Frazer.)

Mr. Erickson: May I ask a question in connection with his answer?

Mr. Poore: Certainly.

Mr. Erickson: As I remember, Mr. Frazer said he didn't see Miss Murphy lying down, she was standing up?

A. That's right.

Mr. Erickson: Are you referring to the place where she was standing?

A. I am referring to the place where she was when I come up. I am referring to the place where she was brought to her feet.

Mr. Erickson: Thank you.

Q. (By Mr. Poore): I hand you the Defendant's Exhibit No. 9 [241] for identification—not for identification, but it has been admitted in evidence—and ask you if you know what that picture is?

A. That's the same end only facing more towards the coffee table, and it shows more of the full aisle itself. This end here (indicating) would be the end of the last picture, and this (indicating) would be the aisle from there on through.

Q. What appears to be the square corner of the display counter is the same display counter identified in the previous exhibit, is that correct?

A. That's right.

Q. Is that the same corner that was at that time rounded? A. It was rounded at the time.

Q. And would you indicate again with this grease pencil on this particular exhibit where it

(Testimony of Walter C. Frazer.)

was that you first saw Miss Murphy on the date of the accident?

(Witness does as requested.)

Q. And I place a "1" inside a circle that you have placed on Defendant's Exhibit No. 9. Now, I hand you Defendant's Exhibit No. 10, and ask you if that same display counter appears there as was in the previous exhibits?

A. This is the end we were just speaking of right here (indicating).

Q. That is the same display counter?

A. Yes. [242]

Q. Now, in what direction was the photographer facing with that shot?

A. He was taking it from north to south.

Q. Looking toward what direction?

A. Toward south.

Q. Toward the front of the store?

A. Yes.

Q. And there again would you indicate with the grease pencil approximately where it was that you saw Miss Murphy on that day in question?

(Witness does as requested.)

Q. And I put a "1" in the circle which you have already drawn on Defendant's Exhibit 10. You may step back on the stand, Mr. Frazer. I believe you were testifying as to the time that you opened on June 24, 1958.

A. Actually at 8:00 o'clock.

(Testimony of Walter C. Frazer.)

Q. And would you describe to the Court and jury what personnel and what activities generally were going on there that morning, say, from 8:00 until 10:00 or 10:30 in the morning?

A. Well, at first there would be all of the delivery people there, usually at 8:00 or shortly after, and they start coming in with their products such as bread and milk, cookies and cakes, and they stocked their own shelves.

Q. Now, what areas of the store would they be stocking?

A. Well, they would stock the bread table on the east wall [243] at the front of the store, and the cakes are the same, and milk and cream and so forth, dairy products, on the west side at the beginning of the store sales floor.

Q. Now, would these persons in stocking these various portions of the store be traversing the area which you circled with a "1" in these various exhibits?

A. They would have to come in that way with both bread and—mostly bread because they come down that same aisle to go to the east wall to stock the shelves. The others may either come down there or go further to the west and take that last aisle down to their places.

Q. Are those loads of bread of substantial size?

A. Yes; he has a truck which carries, I believe, 10 pallets of bread, I believe that's the word for it. Well, one driver may make five trips, where maybe another would only make one or two.

(Testimony of Walter C. Frazer.)

Q. And how many loaves of bread in a pallet, what you referred to as a pallet? A. Ten.

Q. Now, in addition to bread, what other supplies are brought in at that time of the morning?

A. Milk and cream and cakes.

Q. And do those persons cross the general area as you have indicated on the exhibits with a circled "1"?

A. Some do, most of them do, and some [244] don't.

Q. And what loads are they moving, describe that to the Court and jury, please?

Mr. Erickson: To which we are going to object on the grounds and for the reason that there is no attempt to hook this up with the specific date and the specific instance.

Mr. Poore: Excuse me.

Q. On that particular day in question, Mr. Frazer, what loads would these persons supplying your store be normally carrying or moving at that time of the morning?

A. Well, on that particular day, it would probably be—I would have to go down the line and almost take each one of them.

Q. Well, would you do that, please?

A. We have Eddy's Bakery; they may bring in three of these truck loads of these said pallets on that particular day; and the milk, Community Creamery may bring in a full six-wheel truck, which we have in the store. They use those to bring the

(Testimony of Walter C. Frazer.)

milk in, and some are brought in by just packing the merchandise in boxes and walking in.

Q. Are there any cake dealers on Tuesdays?

A. Pardon?

Q. Any cake deliveries?

A. On the cakes the same; he usually brings them in by just carrying them in a box.

Q. Besides milk and bread and cakes, are there any other [245] deliveries in the front door of the store at that time of the morning?

A. As a rule that would be the size of it.

Q. And would you estimate how many—withdraw that. Now, what is the duties, if any, of your sales force, of your personnel there at 8:00 o'clock or from 8:00 until 10:30 in the morning on that particular day?

A. Well, there would be one to two people, it varies, to set up the produce stand.

Q. Is that the particular stand you have described here? A. Yes, sir.

Q. And what do you mean by "set up the produce stand"?

A. Well, in other words, to fill it up and get it ready for the day's business.

Q. Describe the duties of any other employees from 8:00 until 10:30 in the morning in and around that area?

A. Well, there's myself, I have to take care of the checking in of the orders, unless I am occupied otherwise, then someone else takes care of that.

(Testimony of Walter C. Frazer.)

Then there are two meat men arrive at the same time, too.

Q. Pardon me?

A. There are two meat men that arrive at that time of the morning, too.

Q. Do they have loads?

A. No; they just walk through going to [246] work.

Q. To take orders, is that it?

A. To get back in the market.

Q. Now, is there any customers in the traffic at that time from 8:00 until 10:00 or 10:30 in the morning?

A. We have quite a few.

Q. Approximately how many sales did you have on that particular day?

A. Up until, say, around 10:00?

Q. No; the total day.

A. Oh, the total day, I would say better than 550.

Q. Have you checked that?

A. Yes; it's over 550.

Q. Now, up until that particular time of day, could you estimate the number of persons, suppliers, employees and customers, that would have been in and around that area between 8:00 and 10:00 or 10:30 in the morning?

A. Between 8:00 and 10:00, I would say around 70, 75.

Q. Now, calling your attention particularly to that day again, was there any other incident of any

(Testimony of Walter C. Frazer.)

person having any difficulty slipping or complaining of any slippery substance on the floor?

A. Not to my knowledge.

Q. Now, Mr. Frazer, when was the first that you knew that Miss Murphy had fallen down?

A. I was called, I don't recall by whom, but I was called [247] by one of the clerks, one of the personnel to come up in front.

Q. Where were you at that time when you received the call?

A. I am not quite certain. I was down in one of the aisles towards the back.

Q. Approximately what is the interior size of that store, the floor space?

A. Well, the sales space, I would say would be about 50 feet wide against a hundred long.

Q. And that would be roughly 5,000 square feet?

A. That's right.

Q. Now, what proportion of that would you say is taken up by display counters?

A. Oh, probably a little better than half.

Q. Did you see Miss Murphy fall?

A. I didn't actually see Miss Murphy fall, no.

Q. And what did you say was the first you knew about it?

A. When I was called up to the front.

Q. And what did you do when you were called up, Mr. Frazer?

A. I went over and asked Miss Murphy how she was feeling and where she was hurt and she said that it was her head.

(Testimony of Walter C. Frazer.)

Q. Well, you say you went over, whereabouts in the store did you go to?

A. I went over to where Miss Murphy was standing.

Q. All right, now, where was that in relation to the display [248] counter that you described as then having a rounded edge and the coffee table?

A. Well, right off the end of it, as near as I can figure, where I put those circles.

Q. Does any one of these exhibits, Mr. Frazer, show where the coffee was at that time, the coffee display?

A. Yes; right here (indicating).

Q. Is that still coffee?

A. That is still the same.

Q. It is still coffee. Would you mind putting a box around where the coffee was on that particular day, June 24, 1958?

A. You mean the regular coffee display here (indicating)?

Q. Yes.

(Witness does as requested.)

Q. You have drawn a half of a triangle, would it be all right if I complete this triangle and bring it down?

A. That's right; it's all the way through.

Q. On the Exhibit No. 9, there is now a rough rectangle indicating some coffeewares?

A. Yes.

Q. And on that same exhibit there is another circled "1" which, as I understand your testimony,

(Testimony of Walter C. Frazer.)

is where Miss Murphy was standing when you saw her? A. Yes.

Q. Now, when you first saw Miss Murphy, what position was she [249] in?

A. She was standing.

Q. Was she being supported by anyone, or what is the fact?

A. I believe she was somewhat by Rose Ledingham.

Q. Rose who? A. Ledingham.

Q. And I believe you stated you had some conversation with Miss Murphy. What did you say to her, and what did she say to you?

A. I just asked Miss Murphy how she felt and whether she was hurt, and when she answered that she had fallen and that her head was hurt, I asked her if she would like to go down to the hospital and have an examination, and she said she would. Then I sent her on down to the hospital with Rose Ledingham.

Q. Do you recall if there was any other person in or around Miss Murphy at that time other than Miss Ledingham?

A. Well, as I can recall, there was Rose, and at the time, I believe, Al Squires, I am not certain.

Q. Was there any other person besides Al Squires and Mrs. Ledingham that you recall?

A. There may have been.

Q. Approximately how long did you visit there with Miss Murphy prior to her leaving for the hospital?

(Testimony of Walter C. Frazer.)

A. Oh, just a matter of a very few [250] minutes.

Q. Did you examine the bump on her head?

A. I did.

Q. Would you describe to the Court and jury what your examination disclosed?

A. Oh, it was a good sized bump. I would say the area would be the size of an egg, and the height was about, oh, I don't know, about a quarter of an inch. It is pretty hard to say.

Q. What portion of her head was that on, Mr. Frazer?

A. As I recall, it was towards the back.

Q. While you were around there, and while those others, those other persons were around there, did you notice anybody slip or fall?

A. No; I never.

Q. Did you notice anything slippery in that area? A. No; I didn't.

Q. Did you slip yourself?

A. No; I didn't.

Q. Now, did you make any examination of the floor at that time? A. I did.

Q. And was that at the time Miss Murphy was there or after she had gone, or what is the fact?

A. At the same time.

Q. Will you describe to the Court and jury what your examination [251] disclosed, what it consisted of, how did you examine it?

A. I looked it over closely, and it was, as far as I know, clean. In my opinion, it was real clean.

(Testimony of Walter C. Frazer.)

Q. Did you see any skid marks on the floor?

A. I don't recall seeing any.

Q. Any heel marks? A. No.

Q. Did you see any liquid or foreign substance at all? A. Nothing.

Q. And I believe you described it and said it looked clean? A. That's right.

Q. How much of an area around there did you examine?

A. Well, the immediate area, that whole end and the front of the—the starting of the aisle.

Q. The area around the counter and where the coffee was? A. Where the coffee was.

Q. Now, at that time or thereafter, did you do anything to that area of the floor?

A. Nothing.

Q. And after Miss Murphy left for the hospital, did the business of the store go on as usual, or what is the fact? A. It went on as usual.

Q. Thereafter during that day, did anybody else to your knowledge experience any difficulties in that area—— A. Not to my knowledge. [252]

Q. ——by way of slipping or falling or complaining of a slippery condition? A. No, sir.

Q. After Miss Murphy left for the hospital, thereafter did you see her again prior to this time?

A. I could have; I don't recall.

Q. You didn't go down to the hospital yourself?

A. No; I didn't.

Q. Who was it again that you asked to take Miss Murphy to the hospital?

(Testimony of Walter C. Frazer.)

A. Rose Ledingham.

Q. And approximately how long was she gone, Mr. Frazer?

A. Oh, I would say approximately three-quarters of an hour or an hour.

Q. And thereafter did she return to the store?

A. That's right.

Q. And, as I understand it, then, you did not thereafter see Miss Murphy relative to this accident, you didn't go down to the hospital?

A. No; I didn't go down to the hospital at all.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Did you report this fall to any one? [253]

A. We have a report we have to make out and send to the office.

Q. You sent that to the Safeway office, is that right? A. The Safeway office, yes, sir.

Q. Did Miss Murphy seem dazed at all when you talked to her?

A. Yes; she seemed to be slightly dazed.

Q. Was she calm?

A. Well, she was, I would say, a little excited.

Q. Now, with reference to the pictures and the location of where you saw Miss Murphy, so far as you know, she had been standing for an appreciable time when you got there, or can you say?

A. I wouldn't say it had been very long at all.

(Testimony of Walter C. Frazer.)

Q. Do you think she was standing about at the spot where she had fallen?

A. That was my understanding.

Q. Did you hear her fall? A. No, sir.

Q. Now, the Exhibit No. 9 shows where she was standing past the produce counter and in the aisle in which the coffee was on display, is that correct?

A. Yes, sir; that's how I recall it; that's the spot I recall.

Q. You have indicated on the Exhibit No. 9 that she had gone past the produce counter and was at the head of the aisle in [254] which the coffee is contained, is that right? A. Correct.

Q. Was there a coffee display on the right-hand side as you go in, as well as the left, on that date, or do you remember?

A. On that date, this here coffee display (indicating) wasn't there. They are changed periodically.

Q. And you have designated on Exhibit 9 a stack of coffee marked "Edwards Coffee," and when the picture was taken, that was some sort of a special, would that be why it was there?

A. That's right; the daily special, yes.

Q. And as far as you can recall, on June 24, 1958, that would not have been there, is that correct? A. As I recall it.

Q. Now, your mark No. 1 on all of these indicates that Miss Murphy was standing, if these are 9-inch squares, 9, not to exceed 18 inches from the end of the produce display, is that correct?

(Testimony of Walter C. Frazer.)

A. Yes.

Q. And that would show on all of these because the squares, if it is a nine-inch square——

A. That is a guess on my part. I think it is pretty close.

Q. Now, there is a discrepancy, apparently, in the location, because in the Exhibit 12, you have that "1" placed 1, 2, 3, 4, 5, 6 squares away from the produce counter, while in the others you have it about two or three, is that just the way [255] it happened to look to you?

A. That is the way it looked when I put it down there.

Q. But would you be inclined to say that the others that show her closer, there are two of those, would more truly represent where she was?

A. I believe so.

Q. And by those two answers, you have indicated that on Exhibits 9 and 10, the "1" in the circle more truly represents where Miss Murphy was with relation to the counter, being these two, than in Exhibit 12, which shows her some distance further down the aisle than those two?

A. I would say that would be more so. That's where she was standing when I came up.

Q. Now, you are used to walking on the floors in the Safeway Store? A. Yes, sir.

Q. Because that's your job, isn't it?

A. Yes, sir; it is.

Q. Now, as to who actually came in on the morning of June 24, 1958, and the exact time they came

(Testimony of Walter C. Frazer.)

in, so far as these suppliers are concerned, can you say who actually came in that morning?

A. I couldn't really pinpoint it to any minute, but I can put it within a certain 15-minute radius.

Q. In the first place, do you know how many actually did come [256] in that morning?

A. I can tell you in one second.

Q. I mean, do you recall specifically that that morning you saw those specific people come in?

A. Well, it's every morning we receive these deliveries.

Q. It would be the same on that morning of June 24th as any other day? A. That's right.

Q. Now, you have indicated that those bringing cakes and bread would go down the aisle which shows up very clearly in your Exhibit 9, they would go by the coffee counter going by the bread display?

A. No; I said down the produce counter, down this small aisle here (indicating), and then they would turn here (indicating) and go to the right of the store.

Q. I see, so the way that the exhibit looks, which is Exhibit 9, you have indicated that the bread people do not come down past No. 1, but instead of that, they turn and go off to the right?

A. That's right.

Q. Now, this Exhibit No. 11 shows the carts. We don't have a picture from the front, but I think you have seen this rough drawing of mine here where it indicates that you would come in the en-

(Testimony of Walter C. Frazer.)

trance and go down around here (indicating), and then go past a railing, and the course of the bread and cake [257] people would be around this way (indicating), is that correct? A. Correct.

Q. And that's rather a wide aisle, is it not, between the produce and that fence?

A. What do you mean by wide aisle?

Q. Well, it would be wider than the regular aisles going down through the displays, would it not?

A. It probably wouldn't be quite as wide—you are asking about this spot right here (indicating), between the buggies and the display case?

Q. Yes.

A. It wouldn't be as wide as the full aisles in the store on the sales floor.

Q. Well, my recollection from observing the store this morning and prior to that is that this aisle (indicating) would probably be about eight feet wide between this rail and the display case, do you think that would be about right?

A. That seems like a lot.

Q. Well, what would you say it would be, six feet?

A. Probably six, but, like I was saying before, sometimes we put baskets up to the side here (indicating). Now, I think you asked me once before, and I think I said three and a half or four feet, whatever I said, but it was right in there, but that would be with a line of baskets. Now, sometimes we have them, sometimes we don't have them. I

(Testimony of Walter C. Frazer.)

don't [258] recall if they were there that morning or not.

Q. You have been referring to Exhibit 11, which is the exhibit showing the baskets lined up in the rear view looking towards the checking stands, is that correct? A. Yes.

Q. And the question that I asked you was about the width of the aisle immediately ahead of the produce stand, is that correct?

A. That's right.

Q. And you said that you wouldn't know how many baskets were in there?

A. Well, it all depends just what we have there at the time.

Q. Now, the distance between the rail—may I ask you one question on that? Miss Murphy has spoken of a turnstile, and an examination of the store shows there is no turnstile there now, but you have also testified there was a hole, I mean a spot on the floor—— A. A mark.

Q. ——where the turnstile had been. Was that turnstile there on June 24, 1958?

A. No; it wasn't a turnstile.

Q. It was sort of a gate proposition?

A. I am quite sure we had taken it out by then. Now, I wouldn't swear to that, but all we had on there that isn't there now is, oh, a half-moon effect that was part of a [259] turnstile. That had been left there so the buggies couldn't come on through.

Q. I see, and you are not sure whether that was there or not? A. I am not certain.

(Testimony of Walter C. Frazer.)

Q. The question that I have in mind is that now there is, going over to the check stand, and we have only the rear view of the check stands, there is on the front a rail that goes out some distance to the west, is there not, from the check stands?

A. That rail runs north and south, and it's the length of the check stands on the foremost west check stand. Is that the one you are thinking of?

Q. Well, my recollection is that the carts are lined up alongside of a rail going north and south, and that there is a short stub rail going east and west in front of that.

A. No.

Q. Then I am mistaken on that?

A. You are, sir.

Q. So that the width of the aisle on that particular date depends entirely on how many carts?

A. If we had an extra line, or if we had them lengthwise in front of the other two lines.

Q. So that your estimate of the width of the aisle in front of the produce stand would have to be a guess because you don't [260] know how many baskets there were that morning?

A. That's right; it would be flexible.

Q. Now, if there were no baskets at all, what's the distance between the check stands and the——

A. You mean from the railing to the produce stand?

Q. Yes.

A. Oh, I would say between five and six feet.

Q. You don't think it is more than that?

(Testimony of Walter C. Frazer.)

A. I don't, but I am a poor judge of that kind of stuff.

Q. Well, one or the other of us is. I believe you have testified that the people bringing in milk would go to the extreme west wall, and go down that aisle, is that true? A. As a rule.

Q. And you say that after the fall, the floor in the area looked real clean?

A. It did to me, yes, sir.

Q. Unusually so?

A. No, sir; about the same as it usually is.

Q. You spoke of the floor being a bit rough. Did you have reference to the area that you have marked No. 1 on the exhibits, or were you speaking of other areas of the floor?

A. What was that?

Q. You said in your direct examination that the floor was a bit rough. Were you referring to the area where you saw Miss Murphy standing, or referring to the other areas? [261]

A. I was referring more to the area in the front.

Q. The main entrance? A. Yes, sir.

Q. I think you have testified on my earlier examination that there wasn't much wear on the tiles there at the end of the produce counter, not as much as there was in the main entrance, is that true?

A. I said there was less, I believe.

Q. So that the tiles there would be in a better condition? A. Yes.

Q. And is it true that where the tiles wear, the

(Testimony of Walter C. Frazer.)

dirt pits them somewhat, and they are a little grater surface and a little rougher surface?

A. It can be that way after a certain amount of traffic has been over the floor.

Q. My observation of the floor was that in that main entrance and going past the check stands, the tiles seemed to be a little pulpier than they were in the other aisles. Would that be a fair description of it? A. Of the front end?

Q. Yes.

A. Well, it would be more of a rougher surface.

Mr. Erickson: That is all I have. [262]

Redirect Examination

By Mr. Poore:

Q. Mr. Frazer, have you paced off the distance from where the turnstile formerly was, if that's what the thing was called, to where Miss Murphy was standing, the approximate distance there?

A. I did from the door on through.

Q. And how far was that?

A. That was 15 steps.

Q. Now, what do you mean by a step?

A. A regular walking step.

Q. Would you illustrate to the jury what you are referring to by a step, just get down and show us 15 of those?

A. I just walked as I would normally (demonstrating).

Q. 15 of those? A. Yes.

Mr. Poore: We have no further redirect.

(Testimony of Walter C. Frazer.)

The Court: Sit down just a minute. I wish you would tell me and the jury about the conversation you had with Miss Murphy. Mr. Poore asked you to tell us about that conversation, and from the way you told it, I kind of have the impression that you were telling us your conclusion as to what the conversation was, you weren't using the words that you used, and the exact words that she used. What was the first words you said to her? Don't say, "I asked her how she was," [263] but what were the words, "How are you," is that what you said, or "What happened," or what are the words that you used?

A. Well, I probably said—I am not certain of what I did say your Honor, but to be close, I would say, "How are you, how are you feeling," and "were you hurt," and she in turn told me that "Yes, my head hurts quite a bit, and I have a bump," and she asked me to feel the bump on her head, which I did.

The Court: Did she say anything in that conversation—in that conversation you have just now recited, you have not said anything about a fall or a slip or anything of that kind. Did she say anything like that?

A. No, not that I recall.

The Court: As I recall when you first recounted the conversation, you used the words something about her falling. She didn't use the words, she didn't say that she fell?

A. Not that I can recall, your Honor.

(Testimony of Walter C. Frazer.)

The Court: She didn't say anything about how she got on the floor?

A. She was more or less talking about her condition.

The Court: She didn't say how she got the bump on her head?

A. No, not at the time, she didn't say it to me.

The Court: Very well.

Mr. Poore: No further redirect. [264]

Recross Examination

By Mr. Erickson:

Q. You assumed, or you knew as soon as you got there that she had fallen? A. Yes, sir.

Q. And you assumed the bump was the result of the fall? A. That's what I assumed.

Mr. Erickson: Nothing further.

Redirect Examination

By Mr. Poore:

Q. Mr. Frazer, when you were paged, so to speak, do you recall if you were told what had happened?

A. Well, whoever told me said that somebody had fallen up in front, and that's when I walked up to where Miss Murphy was.

Mr. Poore: No further questions.

(Witness excused.)

ALBERT SQUIRES

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Mr. Squires, would you please state your name to the Court [265] and jury?

A. Albert Squires.

Q. Where do you live, Mr. Squires?

A. At 321½ North Alabama.

Q. And are you married? A. Yes, sir.

Q. Do you have a family? A. No, sir.

Q. What is your business or occupation?

A. I work for the Safeway Stores at the store on East Granite Street.

Q. How long have you been so employed, Mr. Squires? A. Since 1951.

Q. What is the nature of your work over there?

A. Well, right now, I am the Produce Department Manager, but at the time this accident must have happened, I wasn't, I was employed as the head clerk.

Q. I see. Now, as I understand it, your employment during the past five years has been in the East Granite Street store? A. Yes, sir.

Q. Now, do you recall an incident on or about June 24, 1958, involving Miss Murphy, the plaintiff here? A. Yes, sir.

Q. Do you recall seeing her on that day in the store? A. Yes, sir. [266]

Q. Did you see her fall? A. No, sir.

(Testimony of Albert Squires.)

Q. When was the first that you knew that she had fallen?

A. Well, I was in that aisle where I think she had fallen, but I wasn't sure because I heard this, well, kind of a strange noise, just a little different noise than you would normally hear, and I turned and looked up the aisle, and I immediately went towards her.

Q. Went where?

A. Went towards the spot where Miss Murphy was.

Q. When you first saw her, what was her position on the floor?

A. Well, I think when I got there, I think, if I remember right, she was partially to her feet, with the help of Mrs. Ledingham.

Q. Now, if we can orient where you were working at that time. Would you take a look at these pictures, Mr. Squires, and see if any of those show the general area where you were working when you heard this noise.

Mr. Erickson: To which the plaintiff is going to object because by reason of the marks which have been put on the exhibits by the prior witness, the pictures are in effect leading and suggestive of the answer.

The Court: Overruled. He doesn't know what the marks are as far as I know. [267]

Mr. Erickson: Well, he was present in the courtroom, your Honor.

The Court: Well, I know—were you present in

(Testimony of Albert Squires.)

the courtroom during all the time the last witness was testifying?

A. No, your Honor, I just came in.

The Court: Just came in before you went on the stand? The objection is overruled, go ahead.

Mr. Poore: To be sure we don't violate—is there any exclusionary rule here, your Honor?

The Court: No.

Mr. Poore: There are other persons back there.

The Court: No, no.

Q. My question was if there is any picture here that shows where you were at the time that you heard this unusual noise?

A. I was down this aisle here (indicating), but this picture doesn't go down far enough to show exactly where I was.

Q. All right. Now, you are referring to Exhibit No. 9, and to the aisle that's shown in that exhibit?

A. Yes.

Q. Is that the exhibit that has coffee in the aisle, in the display counter adjacent to the aisle, or at that time had coffee?

A. Well, no, it didn't have coffee right then. It was stocked with other items.

Q. Well, was there any coffee in the full length of the aisle [268] there? A. No, sir.

Q. You don't believe there was. Where was the coffee at that time?

A. It was right on the other side.

Q. By right on the other side, you mean on the other side of the same counter? A. Yes, sir.

(Testimony of Albert Squires.)

Q. What side of the counter is this, east or west?

A. This here is the east side.

Q. And would the coffee have been on the west side? A. Yes, sir.

Q. Now, does this Exhibit No. 9 show the beginning of the aisle where you were working?

A. Yes, sir.

Q. Now, approximately how long would you say that aisle was? A. The total length?

Q. Let's phrase it this way: Approximately how far down that aisle were you from where you first saw Miss Murphy?

A. I was about three-fourths of the length.

Q. And how far would that be in distance, Mr. Squires? A. Oh, gee——

Q. Could you pick out some object here in the courtroom that you think is about that [269] distance?

A. Oh, I would say it was as long as this courtroom.

Q. The full length of the courtroom?

A. Yes, sir.

Q. Now, was anyone working there with you at that time? A. Yes, sir.

Q. And who was that?

A. That was Tom Hart.

Q. Who was that, sir? A. Tom Hart.

Q. Tom Hart? A. Yes, sir.

Q. And after you heard this noise, what did you say you did?

A. I immediately went towards that noise at a

(Testimony of Albert Squires.)

hurried step, and as I remember it, she was partially to her feet with the help of Mrs. Ledingham, and I helped her up the rest of the way.

Q. And you say you helped her up yourself with the help of Mrs. Ledingham? A. Yes.

Q. Now, would you describe how you assisted her up, if you recall?

A. If I remember right, I think I took her by the arm and helped her to her feet.

Q. Do you recall whereabouts on the floor of the Safeway Store Miss Murphy was when you first looked up and saw her? [270] Where was she in the store when you first saw her?

A. Right at the head of this aisle.

Q. The same aisle that you were working in?

A. Yes, sir.

Q. Is that the same aisle that runs into the produce counter?

A. Yes, sir, it just runs right up and runs to the end of the produce counter.

Q. Now, do any of those pictures there show the area where Miss Murphy was situated when you first saw her?

A. Well, I believe it was right about here (indicating).

Q. Now, you have put your finger on a spot, and would you mark that with a—with some designation that you want, an "X" or a "Y" or something?

(Witness does as requested.)

Q. Now, what portion of her body would you say

(Testimony of Albert Squires.)

was there, Mr. Squires? And you have made a—is that an “X” or a “Y”? A. That’s an “X.”

Q. Can you make the leg a little longer and draw a circle around that?

(Witness does as requested.)

The Court: In other words, Mr. Poore doesn’t know how to read, is that the explanation of that?

Q. What portion of the plaintiff’s body does that represent, or is it a general representation?

A. That represents her whole body to me. [271]

Q. About where she was situated on the floor?

A. She covered the whole area there.

Q. What direction were her feet pointed—how was she laid out or what is the fact, describe it to the Court and jury?

A. Well, it looked like to me her legs were going towards the north.

Q. That would be towards you?

A. Yes, sir.

Q. And then what direction would her head have been going? A. To the south.

Q. Out toward the Granite Street entrance?

A. Yes, sir.

Q. Now, when you first saw her, what was her position on the floor? There again, just describe in your own words what you recall?

A. It has been so long ago I can’t remember very good except I think when I first saw her, I think she was at the beginning of getting up.

(Testimony of Albert Squires.)

Q. And it was then that you ran up this distance and assisted her to her feet?

A. Yes, sir.

Q. You and Mrs. Ledingham. Do you know where Mrs. Ledingham had been immediately prior to the accident? Do you know of your own knowledge where she had been?

A. I think she was in the check stand waiting on trade. [272]

Q. And am I correct in this, that you and Mrs. Ledingham assisted her to her feet?

A. Yes, sir.

Q. Now, did you have any conversation there with Miss Murphy at that time?

A. Not that I can remember, I don't think I said anything to her.

Q. Do you recall Mr. Frazer coming on the scene at any time? A. Yes, sir.

Q. And approximately how long after you had Miss Murphy up would you say Mr. Frazer showed up? A. I would say immediately.

Q. Now, in your assisting Miss Murphy up, did you slip or slide or anything like that yourself?

A. No, sir.

Q. Do you know if Miss Ledingham did?

A. I don't know, but I don't think she did.

Q. Did you see her? A. Did I see her——

Q. Slip or slide or apparently have any difficulty? A. No, sir.

Q. Now, thereafter what happened, after you

(Testimony of Albert Squires.)

had Miss Murphy up and Mr. Frazer came along, do you recall what happened then? [273]

The Court: Counsel, may I interrupt, I think it is time for the Court to take a recess. (Jury admonished.) Court will stand in recess until quarter of three.

(10-minute recess.)

The Court: You may continue.

(Last question read back by Reporter.)

A. Well, if I remember right, I immediately checked the floor to see what condition the floor was in.

Q. You said you checked the floor?

A. Yes, sir.

Q. Describe to the jury how you so-called checked the floor?

A. Well, I looked all over the floor in that immediate vicinity there.

Q. What did you see?

A. Well, I just seen the floor in the same condition it would exist throughout the rest of the store.

Q. Did you see any foreign substance, any liquid? A. No, sir.

Q. Any water or any foreign substance whatsoever? A. No, sir.

Q. Did you notice any slip or slide marks?

A. No, sir.

Q. Heel marks? A. No, sir.

(Testimony of Albert Squires.)

Q. Then what happened after that, Mr. [274] Squires?

A. Well, Mr. Frazer was there, and he takes charge of anything like that and I walked away.

Q. You went back to your job?

A. Yes, sir.

Q. When you left, was Miss Murphy still standing there near where she had apparently fallen down?

A. Yes, sir.

Q. And Mr. Frazer, was he there?

A. Yes, sir.

Q. Was anybody else there that you recall?

A. Tom Hart and Fred Stromseth.

Q. Now, is Tom Hart the same fellow that was working with you at the north end of that aisle?

A. Yes, sir.

Q. And Fred Stromseth, who is he?

A. He is employed at the Safeway on East Granite.

Q. Now, did anybody leave that area along with you, leave with you when you went back to your job?

A. I think Tom Hart did because he was working with me.

Q. And thereafter did you see what occurred, or what is the fact, as to Miss Murphy and Mrs. Ledingham and Mr. Frazer? Did you pay any attention after that to them?

A. No, sir.

Q. You went back to your work at the north end of the aisle?

A. Yes, sir. [275]

Q. Did you ever inspect Miss Murphy's head,

(Testimony of Albert Squires.)

look at the bump? A. No, sir.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Why did you check the floor after Miss Murphy fell?

A. Well, because that's my job.

Q. So that every time anybody falls in the store close to where you are, you are supposed to go and check the floor and see that it is all right, is that true?

A. Most of the time, yes.

Q. And do you have to do that frequently?

A. No, we don't have many people fall.

Q. But you do have some fall, is that correct?

A. None that I know of which would be any fault of the floor.

Q. Well, the question is, have others fallen and you have checked the floor after they have fallen?

A. Yes, sir, one.

Q. You said Mr. Frazer usually takes charge in a situation like that, is that correct?

A. Yes, sir.

Q. Have you seen him take charge in other cases of people [276] falling in the store?

A. Well, it's not just falling. Anything that might come up, I usually go along with Mr. Frazer for the experience.

Q. You have been with Mr. Frazer when he has taken charge when people have fallen in the store, is that correct?

(Testimony of Albert Squires.)

A. Not when anyone has fallen.

Q. Not when they have fallen?

A. I can't remember anyone that has ever fallen.

Q. Well, you testified earlier that you checked the floor because that was your job, you checked the floor after other people have fallen, is that true, or isn't it?

A. Well, you have got me a little confused. There was just one incident where someone had fallen, but it wasn't the fault of the floor.

Q. That is a matter that can be determined, but where did that fall take place? Did it take place anywhere in this vicinity? A. No, sir.

Q. It was in another part of the store?

A. It occurred in the produce department. It was the fault of a grape.

Q. The produce department is right next to where Miss Murphy fell, is that correct? Isn't this the produce rack over here to the left on Exhibit No. 9? A. Yes, sir. [277]

Q. And you show that she fell within a matter of, the way you have it marked, assuming these are nine-inch squares, it would be within about two and a half or three feet from the produce, the corner of the produce department, would it not?

A. No, it wouldn't be that close because in January we have moved this whole produce stand to the north.

Q. Which way is north?

A. Towards the aisle.

Q. So the produce department is now closer to

(Testimony of Albert Squires.)

the aisle in which Miss Murphy fell than it was in 1958, is that correct?

A. It is closer now, yes, sir.

Q. And that change was made since June 24, 1958?

A. Yes, sir.

Q. Now, you and Mr. Frazer disagree as to where the coffee—for the benefit of the jury, the witness, I believe, has indicated that on June 24, 1958, the produce stand was back to the left on this picture by some little distance, is that correct?

A. Yes, sir.

Q. Further than it shows here. Now, it's your testimony, and you seem to disagree with Mr. Frazer, Mr. Frazer said on Exhibit 9 that the coffee display on June 24, 1958, was in the area marked with the pencil, and as I understand it, you say that it was exactly on the opposite side of the aisle, is that correct? [278]

A. Well, yes, sir, but could I clear up one point on that?

Q. Yes, sir, go right ahead. You have a right to explain your answer.

A. At that particular time of the year, we were changing the whole store over, and as close as I can remember, we hadn't had it moved over there yet, but as far as that goes, sir, the exact date when we did move it, I couldn't say for sure.

Q. But at some time around that time the coffee was on the right hand side of the aisle instead of on the left hand side, is that correct, as you go down?

(Testimony of Albert Squires.)

A. No, before it was here, it was all the way over on the other side.

Q. Well, if Miss Murphy and Mr. Frazer both testified that it was on the aisle indicated on Exhibit 9 on June 24, 1958, would you think they might be right?

A. It very well could have been.

Q. Now, Mr. Frazer puts Miss Murphy standing up where the "1" is marked on Exhibit 9, and you put her over two or three feet to the right. Now, having in mind that Mr. Murphy came up after she was standing up——

A. Mr. Frazer?

Q. Mr. Frazer I mean, could you say whether or not that would be the position in which she was standing when he got there?

A. Well, like I say, it was right in that vicinity. As far [279] as marking the exact spot, I can't do that.

Q. Now, isn't it a fact that when you got there and Miss Murphy was just getting up, actually her body was alongside and parallel with the produce stand?

A. No, I don't think it was alongside the produce stand.

Q. What about her head?

A. No, I think her head was more over this way (indicating).

Q. And you are indicating in front of where there is now a coffee display which everybody agrees was not there on that particular date? You indicated

(Testimony of Albert Squires.)

that her feet were towards you as you came down the aisle, is that correct?

A. That's all I could see, if I remember right, was just her feet.

Q. And so you would think that she was lying more crosswise of the store, is that correct, rather than lengthwise? A. Yes, sir.

Q. Have you any accurate or reasonably accurate estimate of how close Miss Murphy was to the beginning of the display counter on the right as you go down the aisle? I have in mind to this corner (indicating). As I understand, these things (indicating) stand out from the display, is that correct, these advertised specials, is that correct?

A. Yes, sir, but I don't think at that time there was anything piled there like that.

Q. Now, with that in mind, do you still think your mark is [280] correct if you only saw her feet if she was lying crosswise, or do you think that she was probably closer to that display counter on the right?

A. Well, I don't think she was too close to the display counter.

Q. Well, Miss Murphy is a small person, and if she was not very close to the display counter and you said she fell with her feet towards you, wouldn't she have had to have been closer to this counter than your mark indicates, or you would have seen all of her, would you not?

Mr. Poore: To which we object as argumentative.

(Testimony of Albert Squires.)

The Court: Overruled.

A. Well, there is an awful lot of area there, and when you are standing down one of them aisles, well, like I was that day, all you could see was just her legs.

Q. And according to your mark here, and counting the squares, there is 9, there is 1, 2, 3, 4, 5, 5 squares, that would be 45 inches, and Miss Murphy, I think, has testified that she is just a little over 5 feet, and if she was lying more or less crosswise, and you could only see her feet, the way this thing is set up, she must of necessity been a lot closer to the display than you show her, would she not?

A. Not if her legs were here and her body was right there at a kind of an angle like that (indicating).

Q. Well, now, which angle was she at? [281]

A. Well, I don't know for sure, all I could see was her legs.

Q. Well, did her legs come at you from the west or from the east?

A. I would say they went to the northwest.

Q. Now, would you indicate where her head would have been with her feet in that position on this Exhibit 9?

A. Well, I would say right about here (indicating).

Q. And you are pointing now directly—so that if her head was in this direction, actually what you would have seen—yes, I guess you show that her head would have been—will you mark that with a—

(Testimony of Albert Squires.)

let's see if you can make a "Y" that counsel can recognize. I know that I could not.

(Witness does as requested.)

Q. You have marked on—do you want to put a circle around that, too, so they all have circles?

A. I am assuming that this was where her head was because I didn't see her head, I am just assuming that.

Q. Well, now, if this—put a circle around that anyway, and we will talk about it.

(Witness does as requested.)

Q. Now, if this temporary display, this coffee display were not there, and if her head was where you actually indicate, there would have been nothing to have obstructed your view of her head, would there, you should have been able to see all of [282] her if she were in that position?

A. No, I didn't, though.

The Court: Well, let me ask one question with reference to that. May I see it, please, just a moment?

Mr. Erickson: Yes.

The Court: Oh. I was going to ask is there any part of a display counter behind where the coffee is displayed there? Is this the end of the display counter that's on that aisle (indicating)?

A. Yes, but it wasn't at that time. Those are new displays on that end.

(Testimony of Albert Squires.)

The Court: I just wanted to ask if there was anything on the other side of these specials?

A. I remember now what was here on this end.

Q. (By Mr. Erickson): What was it?

A. There was a nylon stocking rack and it was pretty big.

Q. Did it jut out into the aisle?

A. Yes, sir.

Q. You have indicated on the exhibit that there was a nylon stocking rack at the end of the display counter on the right hand side as you go down the aisle, is that correct? A. Yes.

Q. And that did jut out into the aisle?

A. Yes, sir.

Q. How far out? [283]

A. Not very far.

Q. Did it jut out as far as these displays, this special coffee display?

A. I don't remember if it did or not. I couldn't tell you for sure how far it was out.

Q. Now, you say the floor seemed to you to be the same in this particular locality as it was in the rest of the store, and the fact is that the floor is worn differently in different parts of the store, and was on June 24, 1958?

A. Just what do you mean by worn, like some spots are worn more than others?

Q. Yes.

A. Gee, I don't think so, they all seem to be pretty much the same.

(Testimony of Albert Squires.)

Q. Well, now, you were—were you at the store today? A. Yes, sir.

Q. Do you recall a couple of feet away from the main entrance there is a rather large, maybe a foot and a half across, patch that is worn clear through to the concrete? A. Gee, I don't recall.

Q. Do you recall that immediately in front of the present produce counter there is a patch in the floor about four inches square, and I am indicating, it may show on this Exhibit 10, I think it is about at that location right in front of the produce department? It isn't a whole tile, it's [284] just a part of a tile, do you recall that there is such a tile?

A. No, sir.

Q. And if there is, you have not observed it, is that correct? A. Yes, sir.

Q. And I am indicating on Exhibit 10 a dark mark on the photograph just in front of the produce counter. Can you say whether or not there is along this main aisle going in front of the checking stands right opposite where the carriages are now, do you recall whether or not there is a patch also there in the floor?

A. I recall one patch there, yes, sir.

Q. Is that where the turnstile once was?

A. Yes, sir.

Q. So that when you say that the spot that Miss Murphy was was exactly the same as the rest of the store, the floor, you are not so sure about that, are you?

(Testimony of Albert Squires.)

A. Well, I thought you were talking about the condition of the floor.

Q. I am.

A. I didn't quite understand that you meant how it was worn. Right there that area you are talking about, I don't think it is worn at all.

Q. As a matter of fact, that's in real good shape compared to the main entrance, is it not? [285]

A. Well, it's in good condition.

Q. And the tiles are not nearly as much worn there as they are coming from the door to the produce counters, is that correct?

A. Yes, sir.

Q. As a matter of fact, it is true, is it not, that the tiles coming from the main entrance until you get around by the carts, and until you get to almost the spot where Miss Murphy fell is very much more worn than the rest of the floor, isn't that true?

A. No, I wouldn't say it was very much more worn.

Q. It is more worn, though, is it not?

A. Well, right there, you are getting more traffic right there than you are in the rest of the store.

Q. That's right, and as a matter of fact, when you go into the store today, it is very obvious to you, is it not, that that does receive more traffic, there isn't the shine on the floor, and the tiles look rather pulpy and beat up, do they not, until you get past that produce counter?

A. No, they don't look beat up to me.

(Testimony of Albert Squires.)

Q. They look considerably more worn than where Miss Murphy fell, isn't that true?

A. Well, I would just say they have more traffic on them. I wouldn't say they were worn.

Mr. Erickson: That's all—oh, one further question. [286]

Q. You said you heard a noise, did you hear Miss Murphy fall? A. I believe I did.

Q. She hit her head a considerable bump, do you think that's what you heard?

A. No, I think I heard a noise that's out of the ordinary noises that you hear around the store.

Q. And you indicated that you were some 30 or 40 feet from her, but still heard the noise.

A. Yes, I heard the noise.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Would you say that Miss Murphy's body the way you have Xed and Yed in there was roughly in the center portion of that intersection where the aisle and the supply counter come together?

Mr. Erickson: To which I will object because the question is leading.

The Court: Sustained.

Mr. Poore: Well, would you—well, you have already indicated. I have no further questions.

(Witness excused.) [287]

THOMAS HART

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name, please, to the Court and jury? A. My name is Thomas Hart.

Q. Where do you live, Mr. Hart?

A. 1940 Locust Street.

Q. And here in Butte? A. Yes, sir.

Q. What is your business or occupation?

A. I am a food clerk at Safeway on Granite Street.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. How long have you been employed by Safeway? A. Close to six years.

Q. And on June 24, 1958, were you so employed? A. Yes, sir.

Q. What was your job then, Mr. Hart?

A. I was a food clerk.

Q. Do you recall an accident about that time involving a Miss Murphy, the plaintiff here in court? [288] A. Yes, sir.

Q. What was the first that you knew about that happening, the happening of that matter?

A. After she had fallen.

Q. Now, where were you at that time, Mr. Hart?

A. Up the third aisle about half way, checking stock.

Q. Were you working with anybody?

(Testimony of Thomas Hart.)

A. Yes, sir.

Q. With whom were you working?

A. Al Squires.

Q. Did you see Miss Murphy fall?

A. No, sir.

Q. Did you hear anything? A. Yes, sir.

Q. Would you describe that to the Court and jury?

A. It was like someone dropped something, or something like that.

Q. Something attracted your attention?

A. Yes, sir.

Q. What did you see?

A. We turned around and looked down to where the noise came from, and we seen her, or I seen her laying there.

Q. Would you describe to the Court and jury what you saw of Miss Murphy?

A. Well, at the time I just seen her laying there. I can't [289] remember if she was starting to get up or anything else. I do remember her laying there.

Q. And what did you do then?

A. I stopped what I was doing and I walked down there, and she was being helped to her feet.

Q. Who was helping her to her feet, do you recall? A. Al Squires and Mrs. Ledingham.

Q. And whereabouts in the store was that where they were helping her up, do you recall?

A. Well, by the produce rack, the north end of the produce rack and the starting of this third aisle.

(Testimony of Thomas Hart.)

Q. Do any of these pictures which are exhibits in the case, Mr. Hart, show the area where you saw Miss Murphy being helped up?

A. This one here would be more my view of it.

Q. Now you are referring to Defendant's Exhibit No. 10, and you have referred to a produce counter. Does that show in that picture there, the produce counter that you are referring to?

A. Yes, sir, it is a dry rack.

Q. And whereabouts on the floor would you indicate that Miss Murphy was being helped up when you saw her?

A. Well, it is right in this approximate area here (indicating). I can't remember for sure.

Q. In the area where the two aisles seem to merge one into [290] the other? A. Yes.

Q. And when you saw her being helped up, you said that Mrs. Ledingham and Mr. Squires were apparently helping her up? A. Yes, sir.

Q. Did you assist them in helping her up?

A. No, sir, I didn't.

Q. And did you stay around there and talk to Miss Murphy, or what developed after you saw her being helped up?

A. No, sir, I didn't stay around there, I went back to my job. She was getting help then, so—

Q. You didn't have any conversation with her?

A. No, sir.

Q. You didn't feel the bump on her head or any such thing? A. No, sir.

Q. Did you make any examination of the floor?

(Testimony of Thomas Hart.)

A. Well, later I was walking around there and I looked at the floor.

Q. After she had already gone?

A. Yes, sir.

Q. Approximately how long after she had left did you look at the floor?

A. Oh, I can't remember, it was maybe 15 minutes, maybe a half an hour.

Q. And did you notice anything unusual about the floor? [291]

A. No, sir.

Q. Now, did you run all the way up to where Miss Murphy was, were you right up to where they were?

A. Right to the head of that aisle there.

Q. In that area did you notice any slippery condition, slip yourself?

A. No, sir.

Q. Did you see anybody else slip?

A. No.

Q. Then, as I understand it, after getting up to the head of the aisle and seeing somebody else was helping her up, you went back to your job?

A. Yes.

Q. At that time was Mr. Frazer there?

A. Yes, sir, he had just arrived, I think.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. You were closer to Miss Murphy than Mr. Squires was, were you not?

A. I don't think so. You mean in the aisle?

(Testimony of Thomas Hart.)

Q. Yes, to where Miss Murphy was.

A. No, sir, I think we were standing pretty much together there. [292]

Q. Did he go ahead of you down the aisle?

A. Yes, sir.

Q. But you testified when you saw her, she was lying down? A. Yes, sir.

Q. Can you say whether she was lying on her back or not? A. Not for sure.

Q. Her feet were headed in your direction, were they not? A. Yes, sir.

Q. Could you see her whole body while she was still on the floor?

A. Well, as far as I can remember, it was just her feet pointed towards myself. I can't remember if I could see her whole body or not.

Q. Did she sit up while you were approaching?

A. She was starting to get up after I——

Q. And do you recall how she was getting up?

A. No, sir, I don't.

Q. Well, that is quite an unusual thing, isn't it, to come up to someone that has fallen in the store?

A. Yes, it is.

Q. But you didn't notice how she was getting up or exactly how she was lying, is that correct?

A. No, sir.

Q. Now, you testified you heard a noise, and you said it was like something falling. Would it be a thud, would that be a [293] good way to describe it?

A. Well, it could be described as that, maybe not quite so blunt as that.

(Testimony of Thomas Hart.)

Q. How far away from Miss Murphy were you when you heard that noise?

A. Well, I was half way up the aisle. I don't know the exact length. I would imagine it was around 20 feet, 25.

Q. Now, with relation to the length of the courtroom, will you pick an object and tell us as best you can with relation to that object how far away you were?

A. Well, I would say about three-quarters of the distance, maybe a little closer.

Q. Of the length of the building?

A. Yes, sir.

Q. But you still heard the noise?

A. Yes, sir.

Q. How loud was that noise?

A. Well, it was enough to attract my attention.

Q. And you were not watching in that direction, no reason to be looking in that direction?

A. No.

Q. Can you say whether or not the particular area where Miss Murphy was lying, whether the floor, the tiles themselves were in pretty good shape?

A. They seemed to be in good shape. [294]

Q. Would you say they are less worn there than they are in other portions of the store, having reference particularly to the entrance?

A. Well, it is less worn than the entrance.

Q. You heard my examination of Mr. Squires, did you not? A. Yes, sir.

(Testimony of Thomas Hart.)

Q. And I called his attention to a worn—three different worn spots, one of them worn and two of them patched. Are you familiar with those spots on the floor as they exist today?

A. No, sir, I am not.

Q. Are you familiar with the worn spot right in front of the door which Mr. Frazer says exists?

A. Yes, sir.

Q. You remember that? A. Yes, sir.

Q. What about the spot where the turnstile was taken down. Do you recall a spot like that?

A. Well, I remember the turnstile or the rail that used to be there.

Q. But you don't remember the patch in the floor that is there now? A. No, sir.

Q. Do you remember a patch right in front of the produce counter, a small one, maybe three or four inches square? [295]

A. No, sir, I don't.

Q. Do you try generally to observe the condition of the store and particularly the floor as part of your work?

A. Well, I do more work on the shelves and that, and they usually have after-school boys to sweep up the floor and that.

Q. So that in your regular work in the store, you don't observe generally the condition of the floor, except perhaps if it were terribly dirty or something like that, is that a fair statement?

A. Yes, sir.

Q. And in your examination of the floor on this

(Testimony of Thomas Hart.)

particular date, in view of your rather casual interest in the condition of the floor, are you in a position to testify that it was cleaner or dirtier or anything else at the spot where Miss Murphy fell than it usually is or is not?

A. Well, there were no foreign objects, I remember that.

Q. Do you recall that the floor seemed to be clean and shiny? A. Well, it was clean.

Q. What about being shiny?

A. I can't remember if it was shiny or not.

Q. You have been working there for some time, and you know that the floor is waxed on Tuesdays and Friday Nights, is that correct? If it is waxed on Tuesday and Friday nights, which is the testimony, do you think that would probably be the [296] nights it is waxed?

A. Friday nights it is, or I can't remember the exact nights they are. I know they are waxed at night during the week.

Q. Can you say whether or not in the morning following the waxing that the floors are shinier and brighter than they are the days following nights when they are not waxed?

A. They look cleaner.

Q. What about being shiny?

A. I imagine they would be with the wax on them.

Q. The manager, Mr. Frazer, testified that the wax tended to wear out in the center of the aisles

(Testimony of Thomas Hart.)

faster than it did on the sides. Have you observed that?

A. Yes, sir, because one night we cleaned the floor that I can remember.

Q. How long ago was that?

A. Oh, that's, oh, about six months, seven months ago, I think.

Q. And what did you do to clean the floor?

A. We mopped the floor, we didn't wax it, though, we just mopped it.

Q. When you say "we," who is that?

A. Myself and Fred Stromseth.

Q. And did you make any particular effort to remove the excess wax wherever it was?

A. No, sir. [297]

Q. This was in addition to what Mr. Rodoni does, is that correct? A. Yes, sir.

Q. Did you use any preparation other than soap and water?

A. No, sir, just soap and water.

Q. It was for the purpose of removing excess wax, is that correct?

A. Well, it was to get the dirt off the floor.

Q. Now, with particular reference to the area right next to the display counters and out of the exact center, were you working particularly on that area, were you working on the edges more than you were the center of the aisles?

A. Well, there was a lot of dust on the floor, and we just swung the mop from side to side down the aisle.

(Testimony of Thomas Hart.)

Q. It wasn't for the purpose of removing the old wax?

A. No, sir, it was to remove the dirt and dust.

Q. Now, in that mopping, you say you generally don't do that, did you notice whether or not there was more wax in any particular portion of the aisles or floor than on other portions?

A. No, sir, I didn't.

Q. You are sure that Miss Murphy's feet were pointed toward you in whatever position she was lying, is that correct?

A. Yes, sir.

Mr. Erickson: That's all.

(Witness excused.) [298]

DR. JAMES G. SAWYER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and the jury, Doctor.

A. James G. Sawyer, M.D.

Q. What is your business or occupation, Doctor?

A. I am a radiologist.

Q. And where are you employed, or where do you work?

A. At the St. James Hospital and Butte Community Memorial Hospital in Butte.

Q. And particularly with reference to St. James Hospital, are you in charge of any records of that hospital?

(Testimony of Dr. James G. Sawyer.)

A. I am in charge of the X-ray records, yes, sir.

Q. And who is the chief person in charge of X-rays down there?

A. I am in charge of the department.

Q. You are in charge of the department. How long have you been in charge of the department, Doctor?

A. About two and a half years.

Q. And what has been your experience in the taking and reading of X-ray films?

A. You mean my experience as a radiologist?

Q. Yes. [299]

A. I have been doing radiology about 20 years.

Mr. Erickson: We will admit the doctor's qualifications.

Q. Now, have you been subpoenaed to produce here in court the X-ray films of a Miss Mildred Murphy? A. Yes, sir.

Q. And you have them with you?

A. Yes, sir.

Q. May I have them? A. Yes, sir.

(Witness produces films.)

Q. Doctor, I hand you Defendant's Proposed Exhibit 14, I believe—13, excuse me—13 through 29, inclusive, and ask you if you know what those X-rays and records are?

A. Yes, sir, they are a series of films taken on Mildred Murphy, and the copy, or the original copy of the interpretation of the films.

(Testimony of Dr. James G. Sawyer.)

Q. Now, have those been in your care and custody and control since they were taken?

A. Yes.

Q. Were they taken with standard photographic equipment? A. X-ray equipment.

Q. Excuse me, standard X-ray equipment?

A. Yes, they were.

Q. And do they truly and accurately portray the portions of the plaintiff's body that they are intended to portray? A. Yes. [300]

Q. Taken under your supervision and control?

A. Yes, sir.

Q. And the report itself, a report of the examination of the X-rays?

A. This is not my interpretation on the written report. My associate, Dr. Hammer, interpreted the film.

Q. Is that a portion of—is that the file of Miss Mildred Murphy in your office and in the X-ray department? A. That's right.

Mr. Poore: We offer in evidence Defendant's Proposed Exhibits 13 through 29, inclusive.

Mr. Erickson: I don't believe you have asked him when these pictures were taken.

Q. When were they taken, Doctor?

A. May I have the card, please? The first series was of the skull dated June 24, 1958, the next was films of the cervical and dorsal spine dated June 27, 1958—

Mr. Erickson: Maybe I can speed these along. On these films there seems to be a date on each

(Testimony of Dr. James G. Sawyer.)

one, is that the correct date on which they were taken?

A. Yes, sir, they are all dated, yes, sir.

Mr. Erickson: That would be sufficient then. I would have no objection on the date. I have no objection.

The Court: They are admitted. You offer what?

Mr. Poore: The entire group. [301]

The Court: 13 to what?

Mr. Erickson: I would have no objection to——

The Court: To 29?

Mr. Erickson: No. That is the report made by Dr. Hammer.

The Court: Very well, they are admitted, each of the exhibits.

(Defendant's Exhibits 13 to 29, inclusive, admitted.)

Q. Now, Doctor, would you mind using this shadowgraph here and stepping down and identifying these various exhibits as to what portion of the anatomy they are, and what, if any, pathology is shown in the X-ray?

A. You wish me to testify myself as an expert?

Q. Yes, I do.

A. Shall we take them in order?

Q. Well, it might be in logical order if we can get the cranium and then work on down.

A. You got them all mixed up.

Q. I am sorry.

A. Now, we have four views of the skull which

(Testimony of Dr. James G. Sawyer.)

were taken on June 24, 1958. These are two side to side views, one to each side, and we have a back to front view, that is, from the back to front with the patient lying flat on the table, and here is a front baser view, or somewhat of a front to back view——

Mr. Erickson: May I interpose a question as to the numbers of these? [302]

Mr. Poore: Yes. Maybe we could start again, Doctor——

Mr. Erickson: It isn't necessary if I know the numbers.

A. These are numbers 15, 16, 17 and 18.

Q. (By Mr. Poore): Now, would you mind putting each one in—referring now to Exhibit No. 15, do you notice there, Doctor, is there any evidence of any abnormality, fracture, or pathology whatsoever?

A. No, sir, this is a perfectly normal X-ray study in this view of the skull.

Q. Now, placing in the shadowbox No. 16, would you state what that is and whether there is any abnormality there, Doctor?

A. That is a front to back view, or a front to basilar view, in other words, where the patient is lying flat on the table, and the X-ray is centered in this area of the skull (indicating) and comes out this area (indicating). It is a semi, so-called, basilar, view, and it is within the limits of normal. This is No. 17. That is a right to left lateral or side to side view with the left side against the film, and

(Testimony of Dr. James G. Sawyer.)

this is within the limits of normal. This is No. 18. This is a left to right side to side view with the right side of the skull next to the film, and this is within the limits of normal.

Q. Now, Doctor, are there any X-ray films here to indicate the cervical spine, namely, the neck area?

A. Yes. These are two views of the cervical spine, or the [303] portion of the spine in the neck.

Q. Doctor, is there any indication in that X-ray of a compression fracture or any other type fracture? Will you please look carefully?

A. There is no evidence of a fracture, old or recent, in this study.

Q. Is there any evidence of any abnormality?

A. There is a narrowing of the fifth cervical vertebral space. If the spaces above and below are compared with this space (indicating), it can be readily seen that this is narrower.

Q. You are referring to Exhibit No. 19, is that correct?

A. This is 19, and the other one is 14. There are also noted some what we call productive changes. By that we mean spurring along the margins of these vertebrae. You can see these sharp pointed projections from the margins of these vertebrae (indicating), and they affect chiefly the lower portion of the cervical spine, and we consider this evidence of degenerative arthritis, or so-called old-age arthritis.

Q. Now, is the narrowing of the intervertebral

(Testimony of Dr. James G. Sawyer.)

joint space between the—is it between the fifth and sixth cervical?

A. It is between the fifth and sixth cervical vertebral bodies.

Q. Is that an abnormal condition?

A. That is abnormal, and in my opinion, it is a sign of [304] degeneration of the disc, that is, the soft, cushiony material between the bodies of these vertebrae, which is not uncommonly seen with this type of arthritis, and it denotes the same sort of disease process as osteoarthritis or degenerative arthritis.

Q. May I ask a question for a point of clarification? On the vertebrae, wouldn't that be between the fourth and fifth, or how do you start counting?

A. This is the first here, second, third, fourth, fifth and sixth. This is the sixth (indicating).

Q. Doctor, would you say that that abnormality was caused by disease rather than trauma?

A. In my opinion it is, yes, sir.

Q. What was the date, Doctor, that this picture was taken?

A. This was taken June 27, 1958.

Q. Is there any way that an expert in your profession can determine how long this degenerative process between the fifth and sixth cervical vertebrae has been going on as of the date the X-ray was taken?

A. How long before this film was taken?

Q. Yes.

(Testimony of Dr. James G. Sawyer.)

A. I would say roughly from six to seven years. I can't say exactly, but it would be a matter of several years, at least.

Q. Would you indicate on Defendant's Exhibit 14 if that also [305] shows the same abnormality or narrowing of the intervertebral joint spaces shown on the prior exhibit?

A. Not quite as well. There is a little question of narrowing here (indicating), but it can't be brought out as well as in this side to side view.

Q. In other words, it appears, but it doesn't appear as clearly? A. It is not as clear.

Q. There is no evidence of any old or present or recent fracture, as I understand your testimony?

A. None whatsoever.

Q. Now, would you take the next series working down the patient's body?

A. This is No. 13 and No. 20. These two views go together.

Q. Explain what area of Miss Murphy's body is shown there, Doctor?

A. These are opposite views, or this is a side to side view of this portion of the spine in the chest area, that is, the so-called dorsal spine. This is a front to back view of the same portion of the spine (indicating).

Q. Now, Doctor, do you see any abnormalities in those X-rays?

A. There is evidence of degenerative arthritis just as was demonstrated in the cervical spine, as evidenced by the spurring along the margins of

(Testimony of Dr. James G. Sawyer.)

these vertebral bodies (indicating). Practically all of them all the way down have it, but [306] especially in the mid-portion of this part of the spine. These vertebrae show this spurring process (indicating).

Q. What is degenerative arthritis, Doctor?

A. That is, I think, the best way to explain that. It is a wear and tear arthritis. The joints of the body are just like parts of machinery. They age and become rough and wear down just like parts of a machine would.

Q. Would those abnormalities be of traumatic origin?

A. They can be, but it would not appear as such, in my opinion, here, as you see it here, because the entire dorsal spine appears to be involved with this. If a so-called—now, in case of injury, you can get similar changes, but you have signs of an injury of the bodies. You also have the changes due to arthritis, the so-called traumatic arthritis, or arthritis due to injury, quite well localized to a certain portion of the dorsal spine. It would not involve the entire dorsal spine.

Q. How long would you estimate this degenerative process has been going on as of the time of this X-ray?

A. A matter of several years, a matter of six or seven or eight years, I don't know.

Q. What is the date of the taking of that X-ray?

A. June 27, 1958.

(Testimony of Dr. James G. Sawyer.)

Q. Do you notice any narrowing of any joint spaces in the dorsal spine? [307]

A. No, sir, not in this portion of the dorsal spine.

Q. No evidence of fractures? A. No, sir.

Q. You are calling attention to arthritic changes, which is the only abnormality you see there?

A. In this view—may I show this?

Q. Certainly.

A. In this view here, there is a little bit of what we call scoliosis. By scoliosis, we mean curvature of the spine to one side or the other. As you can see here (indicating), this spine is not perfectly straight, and you can see a little curvature toward the right side here—this is the right side (indicating). That is not uncommon. Possibly the arthritis has something to do with that; it may be what we call a postural thing, due to poor posture. It is difficult to say exactly the cause of that.

Q. Would it be traumatic in origin, a recent injury as of that date?

A. Not in my opinion. It is something that comes on in a matter of years.

Q. Doctor, explain the rest of the X-rays going down the plaintiff's body? Doctor, while you are looking at those, may I ask you a question?

A. Yes, sir.

Q. For what physician were these X-rays [308] taken?

A. They were taken for Dr. Rotar, at his request. Now, these are Exhibits, or this is Exhibit

(Testimony of Dr. James G. Sawyer.)

21, first which is a side to side view of the skull with the left side against the film.

Q. Do you notice any abnormality there, Doctor?

A. No, sir, this is perfectly normal. This is No. 24. It is a side to side view of the skull with the right side of the skull next to the film.

Q. Does that show the fifth and sixth cervical vertebrae and the narrowing of the disc between them?

A. Well, it shows it, but not quite as plainly. This would be the space in here (indicating), but it is not a true vision.

Q. It wasn't designed to illustrate that?

A. This is centered over the skull itself.

Q. Would you state whether there is any pathology or abnormality there?

A. No, sir, this is within the limits of normal. No. 23 is a front to basilar view of the skull, or front to back, just as I showed before, and I don't see anything of any significance there. No. 25 is a back to front view of the skull with the forehead against the film, and that is within the limits of normal. Next, the next two exhibits are 22 and 26——

Q. When were these taken, Doctor?

A. These were taken September 26, 1958, and they represent [309] two views of the cervical spine, or the spine in the neck.

Q. And do you notice any abnormality there, Doctor?

A. Yes, there is a slight, this narrowing of the

(Testimony of Dr. James G. Sawyer.)

intervertebral space here (indicating), or the space between the bodies of the fifth and sixth cervical vertebrae, it is the sixth intervertebral space, and there are these projections along the margins of the vertebral bodies which are, in my opinion, due to degenerative arthritis; and this (indicating) is the opposite view of the cervical spine, and it shows nothing too much significant in this view. Most of the disease process is seen best in this view (indicating).

Q. Thank you.

A. The next two exhibits are 27 and 28, and represent the opposite views—this is the side to side view and this the front to back views (indicating) or the dorsal spine. This is the portion of the spine in the chest area.

Q. And does that show anything different—did you make any different medical conclusion from those than from the previous X-rays of the same area?

A. The findings are very much—are exactly the same as far as I am concerned, exactly as noted in the previous X-rays of this portion of the spine. They show the degenerative arthritis, and in this view you can see a slight curvature here (indicating). It is very minimal and it appears about the same. [310]

The Court: It's about time for a recess. (Jury admonished.) Court will stand in recess until four o'clock.

(10-minute recess.)

(Testimony of Dr. James G. Sawyer.)

The Court: You may proceed.

Mr. Poore: May Al Squires and the witnesses we have finished with, may they be permanently excused?

Mr. Erickson: I have no objection.

The Court: Very well, they may be excused.

Q. Doctor, referring then to the various X-rays that you have already interpreted for us as to the cervical or neck, and the dorsal spine, did you notice any traumatic arthritis or arthritis originating from injury?

A. Nothing that I would consider traumatic arthritis.

Q. Did you notice any difference in the arthritic changes in the dorsal and in the cervical spine?

A. You mean as to the type of arthritis?

Q. Yes.

A. No, sir, in my opinion, they are the same type.

Q. Now, Doctor, I hand you Plaintiff's Exhibits 1 and 5, which are in evidence. Would you place those in the shadowbox, and now, these pictures, does it show when they were taken?

A. I would say this is November 14, 1958.

Q. And then this other one would be April 7, '59, is that correct? [311]

A. That is correct.

Q. Are those both cervical spine, Doctor?

A. No, sir, this is a side to side view of the cervical spine (indicating). This is a side to side view of the lowest, lumbar portion of the spine (indicating).

(Testimony of Dr. James G. Sawyer.)

Q. Well, excuse me, Doctor, I gave you the wrong one. Would you substitute that?

A. This one in No. 6, dated 4-7-59, and this is a side to side view of the cervical spine.

Q. Now, Doctor, were those X-rays taken at your office? A. No, sir.

Q. Have you ever examined them before?

A. No, sir.

Q. Now, would you——

The Court: Pardon me, what are the numbers of these exhibits?

Mr. Poore: These are the plaintiff's pictures, your Honor. These are Plaintiff's 1 and Plaintiff's 6.

The Court: Very well, proceed.

Q. Now, Doctor, do you notice any narrowing of the intervertebral joint space between the fifth and the sixth cervical vertebrae in these two X-rays?

A. Yes, sir. In this Exhibit No. 1, there is a narrowing of the fifth intervertebral space, and in Exhibit 6 there is similar narrowing of the fifth intervertebral space.

Q. And would you compare that narrowing of those two X-rays [312] with the narrowing that existed as you have testified on June 24, 1958? Is it any greater, any less, or any difference?

A. May I have the other ones, please?

Q. Yes, certainly.

A. In my opinion, the amount or degree of narrowing appears the same. I don't see any difference.

(Testimony of Dr. James G. Sawyer.)

Q. Is there any other change, any difference between the X-ray taken in your office, namely, as indicated by Defendant's Exhibit 26, and Plaintiff's Exhibits 1 and 6?

A. Well, there is a difference in the amount or the number of cervical vertebrae that are seen in this study here (indicating) as compared to these two. Now, I can see only a part of the seventh one in this study here (indicating)——

The Court: Referring to which exhibit?

A. No. 6, and in No. 1, I can see only part of the seventh cervical vertebra. The seventh cervical vertebra in this one (indicating) is brought out entirely. That is this vertebra right here (indicating). That is No. 26, and outside of that difference in the number of vertebrae, which is a matter of difference in technique, and the fact that these two films, Nos. 1 and 6, are lighter than No. 26 in technique, I don't see any difference in the disease process.

Q. Am I correct in this, then, Doctor, that there has been no more narrowing, in other words, no increase in the pathology or in the disease itself? [313]

A. In my opinion, no, sir.

Q. Now, Doctor, directing your attention to Plaintiff's Exhibits 1 and 6, do you notice any recent or old fractures there?

A. No, sir, I don't see any fracture at all in either Nos. 1 or 6.

(Testimony of Dr. James G. Sawyer.)

Q. Now, Doctor, did we have one there of the——

The Court: Let me ask a question, will you, please? You say on all of those exhibits that you have just been referring to there appears to be a narrowing of the intervertebral disc?

A. Yes, sir.

The Court: Now, is there any method available to the profession to measure that narrowing?

A. Well, it is a matter of—I am looking at this from a matter of experience——

The Court: Yes.

A. ——training and experience. I am comparing it just in my mind. These can be measured, they can be compared exactly, yes, sir, if these two films, Nos. 1 and 6, and No. 26 had been taken exactly——

The Court: From the same distance and at the same angle?

A. Under the same technical factors, yes, sir.

The Court: But without that you cannot exactly measure?

A. Not exactly to the millimeter, no.

The Court: In other words, if you took a picture of my neck [314] from one angle, and assuming there was some narrowing of a disc——

A. Yes, sir.

The Court: ——you might take a picture from one angle, and just from a little different angle, the disc would appear to be narrower than from the other angle?

(Testimony of Dr. James G. Sawyer.)

A. It could, yes, sir, from a matter of distortion.

The Court: Well, does the mere fact that there does seem to be some difference, it is not determinative of the matter, unless you can determine the other factors involved in the taking of the picture?

A. If I were interested in measuring it down to the millimeter and fractions of a millimeter, then I would have to have exactly the same conditions.

The Court: For the series?

A. Yes, sir, but in my opinion, the narrowing is quite obvious in these studies, it is so obvious and so gross that it makes no difference whether these were taken exactly under the same circumstances, I mean there isn't that much difference in the technique to make any difference.

The Court: Well, observing the general—I suppose that from your experience, Doctor, you can tell in general the angle of the picture?

A. Yes, sir, I can.

The Court: Of each of these pictures? [315]

A. Yes, sir.

The Court: And observing that, can you then tell whether there has been over the period of time from the first picture to the last picture any change in that narrowing of the disc?

A. Just looking at it on these films, I don't think there is.

(Testimony of Dr. James G. Sawyer.)

The Court: From your experience, that's where your experience comes in?

A. That's right, I don't think there is any difference.

The Court: Very well.

Q. (By Mr. Poore): Doctor, would you mind inserting Plaintiff's Exhibits 3 and 4 in the shadowbox? A. This is Exhibit 4.

Q. And, Doctor, I notice some little light patches there on what I imagine is the hip bone in Plaintiff's Exhibit 4, what are those light colored masses?

A. You are referring to these things here (indicating)?

Q. Yes.

A. Well, they may be probably one of two things, and most likely the second. First, I think they could be little foreign material in the bowel, pieces of bone, even pieces of pills, things like that may cast a shadow on the X-ray, and they are in such a position that they could be within the bowel. Another possibility is so-called calcification or calcific deposits, [316] deposits of calcium within the lymph nodes, which are quite numerous in this area of the abdomen and indicate the results of an old inflammation, perhaps an old appendicitis, and old adenitis—that is an inflammation of the lymph nodes. We see these very commonly, and 95 per cent of the time they are of no great significance.

Q. Now, Doctor, is there anything else in the shadowgraph, the X-ray, that appears abnormal or has any pathological significance?

(Testimony of Dr. James G. Sawyer.)

A. Well, there is a mild scoliosis or a curvature, a mild curvature of—this is the lumbar spine, the lowest portion of the spine, towards the right side.

Q. Is that the same scoliosis or mild curvature that you noted in the dorsal spine in your own X-ray?

A. It is a similar process, yes, and there are also some degenerative arthritic changes in this portion of the spine as evidenced by, you can see this little spurring here along these margins, sharpening of the edges, some in here, some in here (indicating). I don't know how severe it is without the other view, the side to side view.

Q. This may be the lateral view, no, it doesn't look like it.

A. No, it is the same view as this one.

Q. Very well. Then, Doctor, would you say that the scoliosis, the mild scoliosis was of a degenerative nature, or the [317] accidental injury type nature?

A. I would say it is probably of a degenerative nature. I can't tell exactly what has caused it, whether it is postural, or the result of arthritis, but I think it is something that has come on over a matter of years.

Q. Would you take a look at that, Doctor, and see if that is—

A. Here is one that is a little better.

Q. You are referring to Plaintiff's Exhibit 5?

A. This is Exhibits 5 and 2. They are both similar types of views, and they are side to side

(Testimony of Dr. James G. Sawyer.)

views of what we call the lumbosacral area, that is, the lower lumbar spine and the upper sacral spine, that would be in this part of the spine as seen in the other view, and in this No. 5, Exhibit 5, you are seeing the fourth and fifth lumbar vertebrae, and the upper portion of the sacrum, and in No. 2 are seen part of the third lumbar vertebra, fourth, and the fifth lumbar vertebrae, and part of the sixth.

Q. And, Doctor, in those pictures do you notice any pathology of a traumatic origin, in your opinion? A. No, sir, I don't.

Q. You may sit back there, Doctor. Would you say, then, Doctor, from your examination of these films that the degenerative arthritic condition ranges from the cervical spine to the lower lumbar [318] spine? A. Yes, quite definitely.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Dr. Sawyer, do you know who Dr. Clemmons is? A. Yes, sir.

Q. You have known him for some years?

A. Yes, sir.

Q. Do you recognize him as a qualified orthopedic surgeon? A. Yes, sir.

Q. And as a qualified orthopedic surgeon, he would be able to read X-rays, is that true?

A. He should be able to, yes, sir.

Q. And the questions Judge Murray asked you

(Testimony of Dr. James G. Sawyer.)

about reading X-rays indicates that even though they are photographs, we who are laymen cannot look at them and get very much of an idea of what they show, would that be a good statement?

A. I think—what are you referring to, anything specific?

Q. Yes, if I had a broken leg, which I had recently, I could see that it was broken, but as far as the spine is concerned, we laymen would be in a poor position to determine what a picture shows, is that correct?

A. You mean on your own without having—

Q. Yes. [319]

A. Yes, I would expect so, I spent many years learning that myself.

Q. And would you say that also was true of Dr. Clemmons? A. Yes, sir.

Q. And is it also true, Dr. Sawyer, that since what an X-ray shows is a matter of opinion, two qualified, competent radiologists, or orthopods—is that what you call them?

A. Orthopedic surgeons.

Q. Orthopedic surgeons might look at the same X-rays and come up with different opinions, isn't that correct?

A. That is possible, yes, sir. Two radiologists might have a difference of opinion, too.

Q. That's right, and if Dr. Clemmons found that in the lower dorsal, in Exhibits 2 and 5, Plaintiff's Exhibits 2 and 5, he found that there was narrowing, particularly toward the rear, between the sixth

(Testimony of Dr. James G. Sawyer.)

and sacrum, and you say you see nothing unusual about it, would that be a matter of a difference of opinion between the two of you?

A. I wouldn't consider these two views—are you referring specifically to these?

Q. Yes.

A. I do not consider these two views as sufficiently true lateral views, side to side views of this portion of the spine to give an opinion as to that sort of thing. Now, may I explain that [320] further?

Q. Yes. I didn't think any of your X-rays went that low.

A. They don't, but I can use something to illustrate.

Q. Yes.

A. This is, just as a matter of illustration, using Exhibit 19, which is a lateral view of the cervical spine. If this were a true lateral view, side to side view, of this portion of the spine with the central X-ray passing directly through this joint, which is the fifth lumbar here and the first sacral here (indicating), this should bring out the joint just as plainly as any of these are brought out. As you can see here (indicating), here is the lowest lumbar vertebra. In this view it is overlapping the upper sacral vertebra. In other words, this is not a true lateral view. This joint here (indicating) should be just as well defined without any overlapping if this were a true lateral view, it should appear just as distinct as this (indicating).

(Testimony of Dr. James G. Sawyer.)

Q. Does this X-ray show anything unusual in the amount of angle between the fifth lumbar and first sacral?

A. Nothing unusual, based on the fact that this is a distorted view of this portion of the spine. This is not a true lateral view.

Q. What about this one, No. 2?

A. The same applies, neither one of these are true lateral views.

Q. And would you say then that Dr. Clemmons would not be [321] qualified from an examination of those two to give an opinion as to whether there was a greater than normal angle between those vertebrae?

A. I don't see how you can give an opinion as to the conformity of a joint space, the true conformity, without a true lateral view.

Q. And that would be true of the angle between the sacral vertebra and the lumbar, because to me it looks like there is a very decided angle?

A. You cannot estimate angulation of this joint—are you referring to angle in relation just to the vertebrae?

Q. Yes.

A. You cannot estimate the true angle of this lumbosacral joint or the width and the contour, the outline of this joint here (indicating) in a distorted view like this. If I had a true lateral view of this joint, I could very easily illustrate the difference.

Q. Now, Doctor, assume that the patient, Miss

(Testimony of Dr. James G. Sawyer.)

Murphy, complains of a constant low back ache, right there at that particular area, that it has persisted for a year and a half and still persists, in studying an X-ray, if you had that in mind, would that be of any assistance in determining whether there might have been a narrowing, or is that outside of your field as a radiologist? Do you go only on the X-rays?

A. I can give an opinion as far as the patient's symptoms— [322]

Q. Yes.

A. If I had a patient—may I answer it this way?

Q. Yes, go right ahead.

A. If I had a patient that complained of a low back pain, and I wanted to see the condition of this portion of the spine, I would have to have a true lateral view. If my first attempt at obtaining this view was like this, I would take another one changing the angle because that is what we frequently have to do. This is a difficult portion of the spine to X-ray properly and get a true lateral view, and many times we have to repeat two or three times to get a true lateral view, chiefly to determine the true width of that joint and its outline and its angulation.

Q. If the testimony of both Dr. Rotar and Dr. Clemmons is that that is disabling, a disabling situation so far as those vertebrae are concerned, would you have an opinion as to whether they are correct or not?

(Testimony of Dr. James G. Sawyer.)

Mr. Poore: Just a second, we recall the facts slightly differently as just incorporated in the hypothetical question. I don't believe there was testimony—I may be wrong, but I don't believe there was testimony by Dr. Rotar that there was this abnormality of the lower back.

The Court: He didn't base any opinion upon that, as I recall, but in any event, it is an improper question. It is not for the doctor to compare himself with the other doctors. He will [323] examine the picture and the other doctor can examine the picture. He doesn't have to be placed in the position of passing his opinion upon some other doctor, nor should any other doctor be placed in the position of passing his opinion upon Dr. Sawyer.

Mr. Erickson: I understood the rule to be different, that when an expert witness puts himself on the stand as an expert, that counsel would have the right to compare opinions and elicit from the expert who has held himself out in that field almost without limit in matters like that.

The Court: Well, if you want to cross-examine him with reference to whether or not the doctor is an expert, it may be that you could attack his expertness, the expertness of it, but for him to weigh the testimony of one doctor as against the testimony of his own opinion is obviously the question that the jury has to resolve, as I understand the situation.

Mr. Erickson: Yes.

Q. You took the X-rays for Dr. Rotar, did you not?

(Testimony of Dr. James G. Sawyer.)

A. They were taken under my supervision, yes, sir.

Q. And they were for the purpose of allowing Dr. Rotar to make a diagnosis and treatment of Miss Murphy, is that true?

A. Well, Dr. Rotar usually takes the interpretation of my associate and myself as experts in the field for his purposes.

Q. Now, in referring to the exhibits that show the skull, and [324] they show a normal skull, a concussion of the brain wouldn't show up on the X-ray, would it, Doctor?

A. If there weren't any——

Q. I mean if there wasn't any break, it wouldn't necessarily show up?

A. A concussion is a thing that would not be seen by X-ray. That's soft tissue or brain damage.

Q. Now, assuming, Doctor, that Mildred Murphy, having a cervical spine, as indicated by your X-rays, with, I think your report says minimal arthritic change between the fifth and sixth, isn't that correct, that it shows minimal according to the picture?

A. I don't think I said that.

Q. I thought your report said that. Well, anyway, that it shows an arthritic change between those two vertebrae, and assuming that with that condition Mildred Murphy walked into the Safeway Store on Granite Street, and her feet suddenly shot out from under her, and she fell violently, and assuming that the striking of her head on the floor could be heard at some distance and that a very

(Testimony of Dr. James G. Sawyer.)

large swelling developed on the back of her head, and assuming that she had never had any feeling of any pain in the area between these two vertebrae, and that immediately after the fall, she began to feel the pain, which has continued to date, and as a result of the pain and discomfort, she is constantly forcing her head back, [325] as I am demonstrating now, have you an opinion as to whether or not such a fall might serve to aggravate that arthritic situation?

Mr. Poore: To which the defendant objects upon the ground and for the reason that it is improper cross-examination, and secondly, that there is no pleading whatsoever of aggravation of pre-existing injury.

The Court: Do you propose to amend to allege—I don't know, I think that you probably should plead aggravation.

Mr. Erickson: That may be, your Honor, I didn't anticipate that situation would arise. Of course, whether I would amend or not would depend somewhat upon the answer of the doctor. I believe my pleadings are sufficient, your Honor, because they are in general terms. In Paragraph 2, "bruising and injuring plaintiff's head, twisting and wrenching plaintiff's neck, wrenching and injuring plaintiff's cervical and lumbosacral spine, that as a result of such injuries——" and so on. It would seem to me that the pleadings are sufficient to encompass aggravation.

(Testimony of Dr. James G. Sawyer.)

The Court: I'll overrule the objection. You may proceed.

A. Now, would you mind repeating that, please, I just—

Q. Maybe Mr. Parker would read it and we wouldn't encumber the record.

(Question read back by Reporter.)

Q. May I add one more assumption, and assuming that in the [326] fall, she landed flat on her back?

A. Well, I can only judge that from my standpoint by the fact that there are two sets of films that I seen here, one dated in June of 1958, and one dated in, I think it was April, 1959, is that right?

Q. Yes.

A. That is of the cervical spine.

Q. Yes, the cervical, neck.

A. And I can say from that standpoint, that is a matter of six, at least nine months—here is one—there is one in June. Do you have one in—here is Exhibit No. 19, which was taken in June of 1958, and Exhibit No. 6, which was taken in April, 1959, which is a matter of approximately nine months, I would expect this patient, if this were an aggravation of her arthritis, if she received an aggravation of her arthritis, would demonstrate some progression of the spurring process along the margins of the vertebral bodies, and comparing them, vertebra to vertebra and interspace to interspace, and so on,

(Testimony of Dr. James G. Sawyer.)

I don't see any difference. Now, I would expect in a matter of nine months, I would expect some visible change to take place by X-ray. Another thing that gives me a sign that this patient's disease process is not activated or aggravated is the fact that she has in this study, in both studies, in fact, in Exhibits 6 and 19, a perfectly normal curvature of the cervical spine. If you run down along the posterior margins [327] or the posterior aspects of the margins of the cervical spine, this is practically an unbroken curve, which is within the limits of normal as far as any curvature. Now, with an actualy painful cervical spine, one of the first signs of injury to the cervical spine would be to see a straightening of a portion of the cervical spine, and not a straight nice curve all the way down. In other words, it might be curved down to here (indicating), and then all of a sudden, you would have a straightening of the cervical spine. That is a sign of spasm of the cervical muscles, and it indicates injury and it indicates pain in the cervical spine.

Q. To me, Doctor, it looks like that situation is exactly what exists. Do I misunderstand what that shows? It seems to me the last three vertebrae there have straightened, and that there is an abrupt demarcation as between the curve and the straight. Don't I see that right?

A. Nothing that would be out of the ordinary, in my opinion. In my opinion, the curvature is within the limits of normal.

(Testimony of Dr. James G. Sawyer.)

Q. Now, with that——

The Court: May I ask a question? Doctor, are you saying that from those pictures that if there is none, there is no spasm condition of the muscles or nerves in the cervical area of Miss Murphy, or are you just saying that these pictures don't demonstrate that there is spasm or tightening of the muscle? [328]

A. All I can say is that the films don't demonstrate it.

The Court: The films don't demonstrate it. Could there be without it being demonstrated on the film?

A. Yes, it is possible.

Q. (By Mr. Erickson): Now, Doctor, while you are there, you indicated when you were talking about the dorsal spine that the fact that the arthritis was diffused indicated to you that it was probably degenerative. Now, if there is some injury, whether it be as you indicated, an arthritis, or as Dr. Clemmons indicated, some sort of a compression fracture, if there is such a showing as you indicated and it is localized between just two vertebrae, does that have any significance to you at all?

A. If it were excessively different than the remainder of the spine, yes.

Q. What about the vertebrae that are next to it in the cervical spine, they don't show arthritis, do they?

A. What do you mean, next to the——

Q. Next to the fifth and sixth.

A. Yes, there is some here at the seventh, there

(Testimony of Dr. James G. Sawyer.)

is a little lipping and spurring and sharpening of the margin of the fourth here, there is a little bit in the posterior margins of these vertebral bodies to show the same process.

Q. Well, now, here's your report, Exhibit 29, is there any reason why you didn't make reference to that? [329]

A. I am sorry, sir, that's not my report.

Q. Well, Dr. Hammer, who also has the same qualifications as you, says in Exhibit 29, "Film studies of the cervical and dorsal spine demonstrate a slight narrowing of the joint space between C5 and C6, with minimal arthritic lipping," and that's the only reference to it. Since this is your record and it is presented by you, do you have any comment to make on it at all?

A. With respect to what, sir?

Q. Well, why there is no reference in his report to arthritis, since he pointed it out as to 5 and 6? Is it so small on these pictures that you think he overlooked it for that reason?

A. Well, I can't answer that, I don't know why.

Q. Will you put your picture of the cervical spine on again, Doctor, and see whether or not, looking at it, if that shows anything different on the arthritis? Oh, this is your picture, yes.

A. Yes, sir, that's Exhibit 19.

Q. Now, you may take the stand again, if you will, Doctor. In your view, there isn't a retrogression or progression or anything else so far as the cervical spine is concerned. Now, if that is the arthritis

(Testimony of Dr. James G. Sawyer.)

of old age, could you say whether you would expect in a period of nine months to see some progression, some change? [330]

A. Nine months is not a very long time to see changes of this type in the so-called old age or degenerative arthritis.

Q. Now, aside from the arthritis, if the space is narrowed between the vertebrae over what's normal, would you expect a violent fall might result in pain in that area greater than what it would be if you had a normal intervertebral space?

Mr. Poore: To which the defendant renews the objection on the basis there is no pleading of aggravation.

The Court: Overruled.

A. May I have the question again, please?

(Question read back by Reporter.)

A. Not necessarily so.

Q. Might it be true?

A. It might or might not.

Q. And you have no explanation, I take it, why Mildred Murphy, if the record shows that she suffered the fall described and that she immediately got violent pain in her neck for which she went to Dr. Rotar for treatment and still goes to him, do you have any explanation from the X-rays or otherwise, why she would now have that pain when she did not prior to the accident, if that's what the record shows?

(Testimony of Dr. James G. Sawyer.)

A. I have no explanation from the standpoint of the X-rays, no, sir.

Q. And would that be true also if the record shows she now suffers pain in the lower lumbar, and if the record shows she [331] suffered the fall described, would you have any explanation of why she had that pain and why it persists?

A. I have no explanation from the studies I have seen of that part of her spine.

Q. And that is your field, radiology?

A. I beg your pardon?

Q. Your field is radiology? A. Yes, sir.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Doctor, is there any X-rays in your files at St. James Hospital pertinent to Miss Murphy that haven't been produced here under the subpoena served on you?

A. As far as I know, these are all the films I have record of.

Mr. Poore: May this witness be permanently excused, your Honor.

Mr. Erickson: He may as far as the plaintiff is concerned.

The Court: Very well, thank you, Doctor, you may be excused.

(Witness excused.)

The Court: Well, does that end the day's session?

Mr. Poore: Well, I have another witness here that——

The Court: Well, we have been going since 1:30 this afternoon, [332] it's been a pretty long session. How many more witnesses do you expect to have, counsel?

Mr. Poore: We have three lay witnesses: we have Fred Stromseth; we have Leo Rodoni, who cleaned the floor; and we have Mrs. Ledingham, who took her to the hospital; and the expert, Dr. Davidson, if we call him.

The Court: Dr. Davidson and——

Mr. Poore: And Dr. Hammer, who prepared this report.

The Court: Well, we have a pretty full schedule for tomorrow.

Mr. Erickson: May it please the Court, in view of the testimony of Dr. Sawyer, and the importance that attaches to these X-rays, I should like permission to withdraw all of the X-ray pictures for the night, on my assurance, of course, they will be in court at the time we convene, and—of course, they cannot be tampered with, but in exactly the same condition they are now, for the purpose of having them examined by Dr. Clemmons.

The Court: Do you have any objection, counsel?

Mr. Poore: Well——

The Court: Can't the doctor examine them here?

Mr. Erickson: I don't know there will be time. I may not be in a position where Dr. Clemmons will

be available. I obviously don't understand X-rays.

The Court: Of course, you don't know whether he will do it tonight, either. [333]

Mr. Erickson: Well, I am hopeful.

Mr. Poore: Could we adjust the schedule in the morning to permit the same thing, whatever is convenient for the Court?

The Court: I would prefer not to send the exhibits out, and if they were to be otherwise examined outside of the custody of the clerk, I think it would have to be done in the presence of counsel for both sides, and that might be more inconvenient for everybody. In any event, Judge, I suggest you get hold of the doctor, and then talk to me, and we can see what we can do about it.

Mr. Erickson: Thank you, your Honor. As you know, I was unable to reach him at the recess.

The Court: I know you were unable to reach him at the recess. Well, you have a few minutes to try it now. How about the jury? There is at least three hours' more work, isn't there, if we have two more doctors testifying and three other witnesses. The three other witness' testimony will be short.

Mr. Erickson: We will have some rebuttal, and if Dr. Clemmons is available, the rebuttal will be rather extended.

The Court: Well, I guess maybe so, so we will figure on working most of tomorrow anyway, so there is no use starting at 8:30 or 9:00 in the morning, because we will have to work in the afternoon, anyway. I don't think we can finish the evidence tomorrow morning without starting early.

Mr. Erickson: I have no objection to starting early, as [334] far as that is concerned.

The Court: Would you rather start an hour early in the morning, say at 9:00 o'clock, and finish maybe an hour earlier in the afternoon? Would that help you any? Would you rather start at 9:00 o'clock? Let's do that. Then, you are excused until 9:00 o'clock in the morning, and Court will stand in recess until that time. (Jury admonished.) Court will stand in recess until 9:00 o'clock in the morning.

(Whereupon, a recess was had until 9:00 o'clock a.m., the following morning, April 18, 1959, at which time the following proceedings were had:)

The Court: You may proceed.

DR. LOREN G. HAMMER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Would you please state your name to the Court and jury, Dr. Hammer?

A. Loren G. Hammer, M.D.

Q. What is your residence, sir?

A. 3009 Atherton Lane in Butte.

Q. Are you married? A. Yes. [335]

Q. Do you have a family?

A. Yes, one child.

(Testimony of Dr. Loren G. Hammer.)

Q. What is your business or occupation, sir?

A. I am a radiologist.

Q. Where did you receive your medical training, Doctor?

A. In Providence Hospital in Detroit, Michigan, through Wayne University.

Q. What degree, if any, did you receive in medicine from Wayne University?

A. I received my Medical Degree from the University of Colorado, and my specialty training at Wayne University through Providence Hospital.

Q. Now, your medical training at the University of Colorado consisted of how many years training, Doctor?

A. Four years for the medical degree.

Q. Was that after completion of your college training? A. Yes.

Q. And after obtaining your medical degree, you then specialized? A. Yes.

Q. And radiology is your specialty?

A. Yes.

Q. How would you define that specialty, Doctor?

A. It is a special branch of medicine devoted primarily to the use of X-rays, radium, and radioactive isotopes in the [336] diagnosis and treatment of disease.

Q. After you obtained your medical degree from the University of Colorado, you then said you took further training in your specialty of radiology?

A. Yes.

Q. Would you again state what that was? Where

(Testimony of Dr. Loren G. Hammer.)

did you take that training and for how long a period of time?

A. The usual training for the specialty of radiology consists of three years. I took my residency in radiology in Providence Hospital in Detroit, which is affiliated with Wayne University.

Q. Now, the specialty itself was an additional three years? A. Yes.

Q. And does that include the residency?

A. That is the residency.

Q. Now, Doctor, what was your medical experience prior to coming to Butte?

A. I was Chief of Radiology at the Veterans Administration Hospital in Salt Lake City, and Associate Clinical Professor of Radiology with the University of Utah. That was for two years, and I was Associate Radiologist at Hurley Hospital in Flint, Michigan, for a year, and I have been associated with Dr. Sawyer in Butte at Butte Community Memorial and St. James Hospitals for the past year.

Q. Now, Doctor, do you recall on or about June 24, 1958, studying certain X-ray photographs of Miss Mildred Murphy, X-ray [337] plates of Miss Mildred Murphy?

A. Only that it has been recalled to my attention recently.

Mr. Erickson: May I ask one more question?

Mr. Poore: Certainly.

Mr. Erickson: At whose request did you study those plates?

(Testimony of Dr. Loren G. Hammer.)

A. At the request of Dr. Rotar.

Q. (By Mr. Poore): Dr. Hammer, I hand you Defendant's Exhibit No. 29, and ask you if you know what that is?

A. This is the original copy of the X-ray report made by me from the films at St. James Hospital, and is maintained in our hospital as the permanent record of the films.

Q. Now, I notice, Doctor, that there are several apparent entries here on this card, and that they carry the signature of some individual. Could you tell me whose signature that is?

A. Each of the entries, one on 6-24-58, 6-27-58, 9-26-58, are the entries, and they are all signed by me, Loren G. Hammer, M.D.

Q. Now, Doctor, using this Defendant's Exhibit No. 29, and making such use as you see fit of the X-rays in evidence, would you be able to take this report sentence by sentence and read it and explain it to the Court and to the jury? If you would like to step down here if you need this in your explanation. It appears here, Doctor, that the name of the [338] person involved is Miss Mildred Murphy, is that correct? A. That is correct.

Q. And would that be the patient?

A. Yes.

Q. Age 49? A. Yes.

Q. 625 North Montana Street, and then there is "Private" under there, what does that mean?

A. That is to distinguish the patients under a

(Testimony of Dr. Loren G. Hammer.)

private doctor, to distinguish them from contract patients under the A.C.M. contract.

Q. Then there appears "Dr.," which I presume is doctor, then "Leo Rotar"? A. Yes.

Q. And what relationship does he have to this matter?

A. He is the physician taking care of the patient under a private contract.

Q. The attending and treating physician?

A. Yes.

Q. And then "No. 02510," does that have any significance?

A. That is the number assigned to the films, and each film is marked with that number, as a distinguishing number for her case, to distinguish it from other cases of the same day.

Q. Now, Doctor, would you mind taking each sentence and reading it and explaining what the significance of the report is to [339] the jury?

A. May I use the films?

Q. If you believe that would clarify your explanation, I wish you would do so.

A. These are the skull films—there is one missing. These are films of the skull of this patient made on 6-24-58.

Q. You have placed in the shadowbox, Doctor, Defendant's Exhibit No. 21?

A. No. 21, and this is one of the four routine films that we take on a skull. This is the side to side view with the left side down. This is a view—No. 23 is a view of the skull made from front to back

(Testimony of Dr. Loren G. Hammer.)

showing the most posterior portion of the skull; No. 25 is the view made from the back to the front, with the face closest to the film.

Q. What were the dates of these, Doctor?

A. These were made on 6-24-58. This was made on 9-26-58.

Q. By "this," you are referring to Defendant's Exhibit No. 25?

A. And No. 23 was made on 9-26-58; No. 21, on 9-26-58, and my report at that time read, "A routine series of film studies of the skull fail to demonstrate any evidence of bone injury or disease. The vault is normal." This is the cranium vault in which is the bone structure surrounding the brain. "The vascular patterns are prominent but symmetrical." These are the vessels of the brain as we see them outlined inside the [340] cranial vault. "The sphenoid and petrous ridges and the clinoid processes are normal." These ridges in the skull itself are outlines of the inner table of the skull, and we routinely observe them to see if there is any erosion or any fracture, dislocation or disease process. "No injury to the facial bones or to the mandible can be seen." These are the bones of the face, the nasal bones, the orbits of the eye, the alveolar ridge, the mandible with the cheek, and no injury was seen. The impression, negative skull.

Q. Now, then, Doctor, was any other portion of the body examined and upon which you made a report in Defendant's Exhibit, what is it, 29?

A. No. 29. These are Exhibits No. 19 and—

(Testimony of Dr. Loren G. Hammer.)

Q. And 14, Doctor.

A. And 14. They were taken on 6-27-58. These are films of the cervical spine, the upper portion of the spine which extends from the base of the skull to the thorax or chest. They are the routine two standard views, one front to back, and one side to side. The report, "Film studies of the cervical and dorsal spine"—and this includes the dorsal, which I will show—"demonstrate a slight narrowing of the joint space between C-5 and C-6 with minimal arthritic lipping. The cervical vertebral bodies and their joint spaces are otherwise normal with no evidence of recent bone injury."

Q. Could you explain that, Doctor, from the X-rays? [341]

A. The 1, 2, 3, 4, 5—from the film there is a slight narrowing of the joint space between the fifth and sixth cervical vertebral bodies, with the small spurs arising anteriorly and posteriorly, front and back, as evidence of arthritic changes. They are best seen on this examination (indicating) because the other processes tend to obscure the arthritic changes on this examination (indicating). If you will look closely, you will be able to see two tiny spurs in this area, C-5 and C-6 (indicating).

Q. Doctor, is this narrowing an abnormality?

A. Yes, the joint space is normally this width (indicating), and this joint space (indicating) shows some narrowing.

Q. And what would you say was the cause of the narrowing of the joint space?

(Testimony of Dr. Loren G. Hammer.)

A. With the slight irregularity of the vertebral bodies and the arthritic changes, I believe these would indicate some degenerative arthritic changes with the resulting arthritic spurs.

Q. Go ahead, Doctor. No other abnormalities noted there, as you have indicated, no evidence of old or recent fractures?

A. There is no evidence of recent or old bone injury.

Q. And the date of those particular exhibits, Doctor?

A. This examination was on 6-27-58.

Q. For both of the X-rays which you have been interpreting, is that correct, Doctor? [342]

A. Yes, this one (indicating) is marked 6-24-58, but that is an error, a stenographic error.

Mr. Erickson: Which one is that?

Mr. Poore: Defendant's Exhibit No. 19.

Q. Doctor, did you make an examination on the 24th, June 24, 1958?

A. Yes, that was the skull examination. No cervical spine was examined. This is the examination of the dorsal spine on 6-27-58, made at the same time, and the same report made as the cervical spine. This is the film of the spine from front to back (indicating). It includes the bony thorax and the dorsal spine. The film studies of the dorsal spine demonstrate a minimal scoliosis with the convexity to the right as well as minimal arthritic lipping, but no evidence of recent bone injury or disease.

(Testimony of Dr. Loren G. Hammer.)

Q. Doctor, you are interpreting Defendant's Exhibit No. 20?

A. No. 20. This (indicating) is the minimal scoliosis or curvature of the spine. The spine instead of being perfectly straight turns a little to the right in this mid-part of the dorsal spine area. This (indicating) is the side to side view.

Q. Defendant's Exhibit No. 13?

A. Yes, showing the thoracic spine or the dorsal spine, and it also shows the minimal small arthritic spurs. There is no evidence of bone injury or fracture. [343]

Q. Is that minimal arthritic lipping or change consistent throughout the cervical and dorsal spines?

A. The upper cervical spine was comparatively free. The lower cervical spine had arthritic changes, and the entire dorsal spine, except maybe T-12, is involved with minimal arthritic changes. The next examinations were made on 9-26-58.

Q. Doctor, may I ask you there if that arthritic change, in your opinion, is of traumatic origin, or what type origin would that be?

A. It does not have the X-ray appearance of traumatic disease, it has more the appearance of degenerative arthritic changes.

Q. By trauma, we refer, use the word the same as injury?

A. The same as injury. The films—on 9-26, films of the skull, cervical and dorsal spines were made.

Mr. Erickson: May it please the Court, so far

(Testimony of Dr. Loren G. Hammer.)

as the skull is concerned, we have introduced no evidence indicating there was any fracture or bone injury to the skull, and we are willing to agree to that in the interests of speeding the matter up.

The Court: Yes; I think you might proceed to the controverted matters.

Mr. Poore: Very well.

A. These are the films of the cervical spine, the upper [344] spine, made on 9-26 (indicating). They are Exhibits Nos. 26 and 29. The report reads: "Film studies of the cervical spine fail to demonstrate any evidence of recent or old bone injury or disease, other than minimal arthritic changes." In the comparison examination, we find again 1, 2, 3, 4, 5, some narrowing of the joint space between the fifth and sixth (indicating), with arthritic spurs as previously seen.

Q. Is there any decrease in that joint space, in your opinion, between those two dates of June and September, 1958?

A. This is the examination, Exhibit 19, on 6-27, and this is the narrowed joint space between C-5 and C-6 (indicating), and this is the narrowed joint space on 9-26 (indicating), and I see no real change in the appearance of the joint space, no evidence of increase, or evidence of change in the spine. The other examinations at the time were the repeat film studies of the dorsal spine. This is the front to back view, Exhibit 27 (indicating).

Mr. Erickson: As to the dorsal, I think the situation is the same as with regard to the skull. We

(Testimony of Dr. Loren G. Hammer.)

are not contending that the dorsal spine was injured, it is only the lumbar and cervical, and we are willing to agree what the doctor's testimony would be.

Q. Does that complete your explanation to the Court and jury?

A. The impression for the examination was, "Negative cervical [345] and dorsal spines with the exception of minimal arthritic changes with no change in the appearance of the spines since 6-27-58.

Q. Now, Doctor, I hand you Plaintiff's Exhibit No. 1, which has been identified as an X-ray of the cervical spine of Miss Murphy taken on November 14, 1958, and I also hand you the Plaintiff's Exhibit No. 6, which has been admitted in evidence and has been identified as having been taken of Miss Murphy on April 7, 1959, which is also an X-ray of the cervical spine, and ask you if you would study that and compare any changes there, any abnormal conditions there, with the X-rays which you took and interpreted in June and September, 1958?

A. This is Exhibit No. 26, the film of the cervical spine on 9-26-58 (indicating); this is Exhibit No. 19, the film of the cervical spine made on 6-24, according to the date (indicating). As we showed before, the narrowed cervical space, the disc space between C-5 and C-6, with no change in appearance between these two. On Exhibit No. 6, the cervical spine made on 4-7-59, we see a narrowed joint space between C-5 and C-6, with the arthritic

(Testimony of Dr. Loren G. Hammer.)

changes anteriorly and posteriorly. On Exhibit 1, on 11-14-58, a narrowed joint space between C-5 and C-6, with arthritic changes anteriorly and posteriorly. Comparing the two and those made at the St. James Hospital, the only difference I can see is the difference [346] in technique, and the vertebral bodies positively visualized. Only part of C-7 can be seen on Exhibit No. 1, but the two vertebral bodies in question can be seen quite well, and I see no evidence of progression of the narrowing or of the arthritic spurring.

Mr. Poore: Thank you, Doctor, you may take the stand. You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Dr. Hammer, the report you read from is the report you gave to Dr. Rotar, is that correct?

A. Yes, sir.

Q. And you worked with Dr. Sawyer?

A. Yes, sir.

Q. But that is not his report; it is your report?

A. That is my report.

Q. Now, as I understand it, the radiologist works as sort of a teammate with the general practitioner or practitioner in other fields, isn't that correct? A. Yes.

Q. And it is your job to study these shadows that appear on these X-rays, and that has been your specialty, to interpret those to the general

(Testimony of Dr. Loren G. Hammer.)

practitioner, is that correct? A. Yes. [347]

Q. And you would assume when you gave your report to Dr. Rotar that it was going to be used in the treatment of Mildred Murphy, is that correct? A. Yes.

Q. Now, is it sometimes difficult, Doctor, to distinguish, particularly in a case like this where you say the arthritic change is minimal in the cervical, is it sometimes difficult to distinguish by mere examination of the X-rays where the change is minimal whether the change is traumatic or arthritic?

A. In the early traumatic cases, no; in those traumatic cases that have been of long standing, sometimes it can be difficult.

Q. And, as a matter of fact, the reason you have a specialty of radiology is because even examining something that is so much physical as a shadowgram or an X-ray, opinion is a determining factor, isn't it? A. Yes.

Q. And that is the reason why you have radiologists and orthopedic surgeons and the like?

A. Yes, sir.

Q. So it is quite common, is it not, to have disagreement between equally trained men as to what an X-ray shows? A. Yes.

Q. Do you know Dr. Clemmons here in [348] Butte? A. I do.

Q. And do you recognize him as a qualified orthopedic surgeon? A. Yes.

Q. Now, the difference between—do you call a

(Testimony of Dr. Loren G. Hammer.)

single orthopedic surgeon an orthopod, is there such a word?

A. If you know him well. It is not accepted.

Q. Well, I want to get away from the word "surgeon." What is the distinction between an orthopedic doctor and a radiologist, so far as their fields are concerned?

A. A radiologist has no patients of his own unless they are referred to him for therapy, X-ray or radium therapy. Routinely we do not see 80 per cent of the cases that come in to the hospital for examination. They come in with the prescription from the doctor, the X-rays are taken according to a standard plan, they are modified according to conditions, and then we read the films. An orthopedic surgeon has patients of his own. He is primarily interested in the treatment of bone and joint diseases by definition.

Q. And I believe Dr. Clemmons said they are also interested in the ligaments and the muscles that attach to the bone?

A. Around the joints and the bones, yes, sir; anything having to do with the bones is within his realm of interest.

Q. From your work—you have worked with orthopedic surgeons, have you not? [349]

A. Yes.

Q. And with general practitioners and with specialists in various fields? A. Yes, sir.

Q. Would you say the reading of the X-rays is only one of the elements of diagnosis of injury or

(Testimony of Dr. Loren G. Hammer.)

disease in any given case? A. Yes.

Q. So the complete diagnosis requires the consideration of other factors beside the pictures that come from the X-rays, is that correct?

A. Yes.

Mr. Erickson: That is all.

Redirect Examination

By Mr. Poore:

Q. Doctor, in answer to one of Mr. Erickson's questions, you stated, I believe, that in early traumatic cases you are able to determine whether the origin was degenerative or otherwise. Would you explain what you meant by early traumatic cases?

A. Those cases that have involved an injury where there is a definite fracture shown.

Q. Now, in the event, as the evidence has shown here, Miss Murphy fell on or about June 24, 1958, and your X-rays were [350] taken of the skull on the 24th, the cervical spine on the 27th, and again in September of '58, would that be taking the X-rays early in the traumatic history of the case?

A. Yes.

Q. So would it follow, Doctor, that you would be able to determine whether the abnormality was of traumatic or of degenerative origin?

A. Yes.

Q. And what would you say it was, Doctor?

A. I believe it is a degenerative arthritis of the cervical vertebral interspaces and the vertebral bodies. I saw no evidence of a recent fracture.

Mr. Poore: No further questions.

Mr. Erickson: Nothing further.

Mr. Poore: May the doctor be permanently excused?

Mr. Erickson: He may as far as plaintiff is concerned.

The Court: Yes, Doctor, you may be excused; thank you.

(Witness excused.)

FRED STROMSETH

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Would you state your name to the Court and jury, please? [351] A. Fred Stromseth.

Q. What is your business or occupation, Mr. Stromseth?

A. I am a food clerk for Safeway on Granite Street.

Q. Where do you live?

A. 733 South Alabama.

Q. Here in Butte? A. Yes.

Q. Are you married? A. No.

Q. Live with your folks? A. Yes.

Q. Now, how long have you been employed with Safeway? A. Two and a half years.

Q. And during that entire time at the store on East Granite Street? A. Yes, sir.

(Testimony of Fred Stromseth.)

Q. Do you recall on or about the 24th of June, 1958, an accident involving Miss Mildred Murphy, seated here in the courtroom? A. I do.

Q. Where were you working at that time, Mr. Stromseth? A. I was in the back room.

Q. By the back room, would you explain to the jury what that is in relation to the part that the customers traverse?

A. That is in back where we have the back stock behind the [352] butcher shop there.

Q. What was the first you knew about there having been any accident?

A. About five minutes later I come up there, and they were standing there.

Q. You didn't see the accident?

A. No, sir.

Q. You didn't hear her fall or anything like that? A. No.

Q. And apparently you came up, and will you describe the scene that you saw when you came up?

A. She was standing up, and Mr. Frazer and Rose Ledingham and Al Squires and Tommy Hart were there.

Q. And what did you do then?

A. I just come up there and then I left right away.

Q. Did you make any examination of the floor?

A. No; I didn't.

Q. Did you talk to Miss Murphy? A. No.

Q. Did you hear any conversation while you were there? A. No; I didn't.

(Testimony of Fred Stromseth.)

Q. Were you asked to feel the back of her head, the bump on her head? A. No, sir.

Q. As I understand it, then, you left the scene of the accident [353] at that time? A. Yes.

Q. What did you do then?

A. Went back to my work.

Q. Do you have any other knowledge about the accident other than what you have testified to?

A. No, sir.

Mr. Poore: You may cross-examine.

Mr. Erickson: No examination.

The Court: You may step down.

(Witness excused.)

MRS. ROSE LEDINGHAM

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and jury, Mrs. Ledingham. A. Mrs. Rose Ledingham.

Q. Where do you live, Mrs. Ledingham?

A. 100 Minah Street.

Q. Are you a married woman? A. Yes.

Q. Family? A. Two children. [354]

Q. Were you formerly employed by the Safeway Store in Butte? A. Yes.

Q. Would that include the period of June, 1958?

A. Yes.

Q. You are presently a housewife?

(Testimony of Mrs. Rose Ledingham.)

A. Yes.

Q. Now, calling your attention to the month of June, 1958, what was your duties with Safeway Stores at that time? A. Checker.

Q. And by checker, what do you mean?

A. Checking groceries out.

Q. Now, did you receive any money from the customers? A. Yes.

Q. Is that what a checker is? A. Yes.

Q. That is the clerk who takes the payment, is that right? A. That's right.

Q. Where was your station, where do you carry out your duties? A. In the check stand.

Q. Where are the check stands in Safeway?

A. In front of the store.

Q. By the front of the store, what area of the store are you referring to? If the store is on Granite Street there—strike that question. Mrs. Ledingham, I hand you a series of [355] exhibits, and ask you if in any of these exhibits you would be able to demonstrate to the Court and the jury where the check stand is that you——

A. The check stand is——

Q. Well, you take a look through those various exhibits and maybe you will find one there that is of some assistance to you.

A. It is off over here (indicating).

Q. Let's try another one. How does that one look? A. That's it.

Q. Now, you are referring to Defendant's Exhibit No. 11, which apparently shows some check

(Testimony of Mrs. Rose Ledingham.)

stands. Would you mind stepping down to the jury and pointing out the check stands you have described and the particular one where you were on duty that day?

A. I was in this one here (indicating).

Mr. Erickson: Designating—

Mr. Poore: Designating the most easterly one, Mr. Erickson.

Q. Now, what was the first you knew about any unusual occurrence having happened?

A. Well, I heard a thump and looked up.

Q. And did you actually see Miss Murphy fall?

A. No.

Q. Am I correct in this, that at the time you heard the [356] thump, you looked up, and you were then at this most easterly check stand?

A. Yes.

Q. What were you doing there?

A. Well, at the time I was filling the cigarettes, loading the cigarette rack.

Q. There was no customer there right at that particular time? A. No; not at that time.

Q. And when you looked up, what did you see, Mrs. Ledingham?

A. She was lying on the floor.

Q. Describe how Miss Murphy was lying on the floor?

A. Well, her head was facing Granite Street, and her feet were towards Quartz.

Q. Would you describe what her position on the floor was? A. She was on her back.

(Testimony of Mrs. Rose Ledingham.)

Q. Now, again, Mrs. Ledingham, I hand you Defendant's Exhibits No. 12 and No. 10 and No. 9, and ask you if those show any portion of the floor where you saw Miss Murphy lying when you looked up?

A. Well, if this is the second aisle, it would be right about in there (indicating).

Q. Now, you are referring to Defendant's Exhibit No. 10, and by "right about there," you indicated a circled "1"?

A. Right about there, yes. [357]

Q. What portion of her body would have been about there?

A. Well, her head would have been about there. This picture was taken after.

Q. You think her head was about where you are pointing here? May I put a "2" and put a circle around that? A. Yes.

Q. Have I placed the circled "2" on Defendant's Exhibit No. 10 at approximately where you think her head was? A. Yes.

Q. And then her body was facing generally in what direction? A. Here, north.

Q. Would you mind putting an arrow yourself in the direction her body was facing? Or stretched out, rather.

(Witness does as requested.)

Q. So that the tip of the arrow would be pointing towards her feet, is that correct, Mrs. Ledingham? A. Yes.

Q. Now, when you first saw Miss Murphy, then,

(Testimony of Mrs. Rose Ledingham.)

as I gather, she was on her back lying on the floor with her feet stretched out, is that correct?

A. That's right.

Q. What did you do, Mrs. Ledingham?

A. Well, I called over the speaker for Walt immediately and then I went right over.

Q. Who is Walt? [358] A. Mr. Frazer.

Q. And will you make every effort to speak up so we can all hear you? And then what did you do?

A. Well, I went over to her.

Q. And what did you do then?

A. Well, I am not too sure.

Q. Well, what do you believe you did?

A. Well, I imagine I tried to help her up.

Q. And would you tell the jury and the Court what occurred after that as you were helping her up and the events that thereafter occurred?

A. Well, Mr. Frazer came up and Al Squires and Tommy Hart, and then I went back to the check stand for a few minutes, and then I went back over and talked to her, and then I went back to the check stand, and then Mr. Frazer came over and asked me if I would drive her down to the hospital.

Q. Did you ever have any conversation right there at the store with Miss Murphy?

A. Not to my knowledge.

Q. Did you feel her head?

A. Not at the store, no.

Q. And how long would you say that you were around the area where you helped her up?

(Testimony of Mrs. Rose Ledingham.)

A. I would say not over five minutes.

Q. Now, did you, in your assisting her, and moving back from [359] her to the check stand and back again, notice anything slippery about the floor? A. No.

Q. And in helping her up, did you slip or slide yourself? A. No.

Q. Or notice anybody else? A. No.

Q. Did you inspect the floor?

A. I looked at it, yes.

Q. Did you notice anything unusual about the floor? A. No.

Q. Any foreign substance? A. No.

Q. Any skid marks? A. No.

Q. And then Mr. Frazer, or Walt, as you refer to him, asked you to take her to the hospital, is that right? A. That's right.

Q. What occurred then?

A. Well, I drove her down to the hospital.

Q. Well, how did she get from where she was standing there with Mr. Frazer to your automobile?

A. She walked to the car.

Q. Did you walk with her? A. Yes. [360]

Q. Where was the car situated?

A. Right in front of the store.

Q. Describe what kind of a day it was weather-wise? A. It was a rainy day.

Q. Was it actually raining then?

A. It was a drizzle.

Q. Do you know how long it had been raining before that?

(Testimony of Mrs. Rose Ledingham.)

A. Oh, early morning, I would say.

Q. And you left from in front of the store and went where, Mrs. Ledingham?

A. St. James Hospital.

Q. On your way down, did you have any conversation with Miss Murphy? A. Yes.

Q. Will you tell what you said to her and what she said to you?

A. Well, we were talking about the weather, and she did mention that her feet were wet and that she could possibly have slipped, you know, because of the wet on the waxed floor, and I asked her if she felt all right, and she said her head bothered her, and I did feel the bump then.

Q. Is that on the way to the hospital?

A. On the way, yes, after we stopped.

Q. Now, you took her to what hospital?

A. St. James. [361]

Q. And what occurred there, Mrs. Ledingham?

A. Well, they took us into the examining room and Dr. Rotar came in, and they put her in a wheel chair and took her to the X-ray room, and I went along into the X-ray room, and I stayed there until after they had taken the X-rays.

Q. And then what occurred?

A. Well, then her brother came and he said he would take her home, so I left.

Q. How long would you say you were at the hospital, Mrs. Ledingham?

A. I would say about an hour and a half.

Q. And where did you go from there?

(Testimony of Mrs. Rose Ledingham.)

A. I went back to the store.

Q. And did Miss Murphy go with you back to the store? A. No.

Q. And did you see her thereafter that day?

A. Oh, probably as a customer some time later.

Q. But not on that day? A. No.

Q. You went back to work at the check stand?

A. That's right.

Q. Now, in your duties working there at the check stand, checking people in and out the rest of the day, did you deal with the customers that came into the store? A. Yes. [362]

Q. Do you know of any other person who experienced any difficulty on the floor? A. No.

Q. Or any accident? A. No.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Will you describe that thump that you heard?

A. Well, it was an out-of-the-way noise; it was like a thump; it was enough to attract your attention.

Q. Now, when Miss Murphy was there at the store—first, before that, have you an estimate of the length of time it was between the hearing of the thump and the time you got over to where Miss Murphy was?

A. Oh, it was just a few seconds, I would say.

(Testimony of Mrs. Rose Ledingham.)

Q. You paged Mr. Frazer and then you immediately went over, is that correct?

A. That's right.

Q. Could you see her lying on the floor from your check stand? A. Yes.

Q. Do you recall whether there were carts between her and you? [363]

A. I don't believe there was. I mean there were carts back farther toward the door, but there wasn't any out directly.

Q. The store is a little different now than it was in June, 1958, isn't that correct?

A. Yes; that's right.

Q. I believe the testimony is that at that time there was some sort of turnstile which doesn't show here in any of these pictures, but in 11, some sort—

A. It would be over here (indicating).

Q. It wouldn't be ahead of the carts?

A. Just a little bit to the east end of where the carts are.

Q. And that is no longer there? A. No.

Q. And you are indicating that from where you stood—I can see a scale up in the right-hand corner? A. Yes.

Q. And you were in the check stand, the one to the extreme left?

A. This one over here (indicating), yes.

Q. And that is the one in back of the sign that says, "St. John's Bread, 29 cents," is that correct?

A. I don't know what they have there now.

(Testimony of Mrs. Rose Ledingham.)

Q. I mean in the picture it shows that?

A. Yes.

Q. And you could see her from the rear of your check stand, [364] is that correct?

A. That's right.

Q. Were there any other customers in the store?

A. I would say so, a few.

Q. Do you remember whether there were or not?

A. Well, they had been straying in all morning, you know, quite a few.

Q. You have no recollection on that morning?

A. Oh, I mean I had quite a few customers through, yes.

Q. What about at the time of the fall?

A. Well, I would say there was some in the store.

Q. Do you know that there were?

A. Oh, I would be pretty certain of it.

Q. Did any of them come over to where Miss Murphy was? A. No.

Q. Now, when you got over to where Miss Murphy was, she was trying to get up by herself, or was she still just lying there?

A. She was still just lying there when I got there.

Q. Were you the first one to try to help her up?

A. Well, I think Al was there just about the same time.

Q. Squires, is that Al Squires?

A. Al Squires, yes.

Q. And who arrived next after Squires?

(Testimony of Mrs. Rose Ledingham.)

A. Well, Thomas Hart and then Mr. [365] Frazer.

Q. Mr. Frazer was the last to arrive on the scene? What about Mr. Stromseth?

A. They were all just about the same time.

Q. Now, did you see her move at all as she lay there on the floor?

A. Now, I couldn't swear to that either way, other than, you know, starting to get up.

Q. That was rather an unusual occurrence, wasn't it? A. What do you mean?

Q. To have some customer lying flat out on the floor? A. Yes; it is.

Q. But you still didn't notice that, whether she moved before you got there?

A. Well, I mean she wasn't unconscious, I knew that much.

Q. How did you know that?

A. Well, she must have moved, but I know that she was not knocked unconscious.

Q. Did she seem dazed when she got up?

A. Yes.

Q. How long did that seem to last?

A. Well, I would say she was slightly dazed when I took her down to the hospital.

Q. You know Margaret Rosa, do you not, Mildred Murphy's sister? A. Yes. [366]

Q. If Margaret Rosa said that you had a conversation with her in which you said that Mildred seemed very dazed, and you were worried for fear she was going to faint all the way down to the hos-

(Testimony of Mrs. Rose Ledingham.)

pital, do you think that that would be a correct statement? A. That is right, yes.

Q. But you say now that she talked about the weather? A. We did comment on it, yes.

Q. Did she? A. I would say yes, she did.

Q. And she was doing that in spite of the fact that she had just suffered a very severe fall, and you, yourself, felt the bump on her head, did you not? A. That's right.

Q. Would you describe it?

A. It was quite a large bump.

Q. You could hear her hit when she actually fell? A. That's right.

Q. But she spent the time going down to St. James during the time you were worried about her fainting commenting about the weather?

A. Well, that's why I was trying to keep talking to her.

Q. Did she talk about the wet shoes, or did you?

A. She mentioned it. I mentioned it, and she agreed, you know, we talked back and forth that it was so easy to slip. [367]

Q. And who mentioned it first?

A. Well, I probably did; I couldn't swear it.

Q. Now, there is a canopy over the sidewalk, is there not? A. Yes.

Q. In front of the Safeway Store on Granite Street? A. Yes.

Q. And that extends clear to the east edge of the building, the east corner? A. Yes.

Q. Since you have worked there quite awhile,

(Testimony of Mrs. Rose Ledingham.)

could you say whether or not the parking lot on the edges, and particularly up against that east wall is gravel rather than paved as it is over the rest of the parking lot? A. I believe it is paved.

Q. My observation of it, Mrs. Ledingham, is that at least now, the gravel has tended to work to the edges, and particularly around on that east wall, and that that gravel on top of the paving extends out some 10 feet or so. Now, if you have observed it, I would like to know. If you haven't why——

A. No; I haven't.

Q. And if a car were parked at the extreme corner of the building, the southeast corner, right up against the sidewalk, the distance that a person would travel in going from the car to the store would be rather short, would it not? [368]

A. Yes.

Mr. Poore: To which the defendant objects as outside the scope of the direct examination of this witness.

Mr. Erickson: She has testified to the wet shoes, your Honor.

The Court: Yes. Overruled.

Q. So that if the car in which Mildred Murphy arrived in the morning were parked at the corner, as indicated here (indicating), and she got out of the car on the right-hand side and walked around, she would be under the canopy, which would protect the sidewalk, just by walking the length of the car and around, isn't that correct?

(Testimony of Mrs. Rose Ledingham.)

A. Well, underneath the canopy it still gets wet around the edges.

Q. The door is only how far from the corner of the store? A. I would say about 10 feet.

Q. And can you say whether that morning on June 24, 1958, the sidewalk was wet?

A. I would say it was, yes.

Q. Now, why would you say it was?

A. Well, because walking to the car, right beside my car it was wet.

Q. And you recall that? A. Yes.

Q. Was it raining? [369]

A. Yes; it was; it was a drizzle; it wasn't a heavy rain.

Q. Did you have a parasol or umbrella with you going to work that morning? A. No.

Q. So it wasn't a heavy enough rain for you to carry an umbrella?

A. Well, no; I parked right in front of the store and I only had to jump out of the car and run into the store.

Q. Did you have a raincoat?

A. Well, I had a coat.

Q. Now, there are parking meters in front of the store? A. That's right.

Q. And that was your practice to leave your car—

A. For two hours in the morning I usually did.

Q. And did you leave—did you move the car later on?

A. When I took her to the nospital.

(Testimony of Mrs. Rose Ledingham.)

Q. Was it raining then? A. Yes.

Q. How hard? A. Just a drizzle.

Q. Now, when you got to the hospital—one more question. In discussing this matter with Mrs. Rosa, do you have any recollection of whether you told her about the conversation you were supposed to have had with Mildred Murphy in the car in which Mildred Murphy was supposed to have said her feet were [370] wet? A. Oh, I don't recall.

Q. Now, when you got to the hospital, did you go with Miss Murphy to Dr. Rotar's office?

A. They took us to an examining room.

Q. Did you see anybody there at the hospital before you went to the examining room, that is, any official of the hospital?

A. Just the nurse that took us—that we met there, and then Dr. Rotar came in.

Q. Then after Dr. Rotar saw Miss Murphy, you went with her to the X-ray room?

A. That's right.

Q. Did you at any time during that period in the hospital have any discussion with Miss Murphy about who was going to pay the hospital bill?

A. I mentioned not to worry about it, that they usually took care of it, I mean, you know, referring to the current bills.

Q. Safeway you mean? A. Yes.

Q. And did you know that from your own experience?

A. Well, it was always understood that way.

Q. So that if anyone fell or was injured in the

(Testimony of Mrs. Rose Ledingham.)

store, it was your understanding that the practice was for Safeway to [371] pay it?

A. They always did, that was always understood.

Q. Do you know whether they did in this instance? A. No.

Q. Did you go up to the business office during any of that time to make arrangements with the business office as to payment? A. No.

Q. Did your own feet get wet that day going to the car? A. They were damp.

Q. How would you distinguish between damp and wet?

A. Well, they weren't soaked, but the soles were wet.

Q. Did you observe that yourself?

A. Well, naturally, I wear light shoes.

Q. Did you go into the car from the store side, or did you have to go around?

A. I had to go around.

Mr. Erickson: That is all.

Mr. Poore: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: I think we had better take a recess at this time. (Jury admonished.) Court will stand in recess until 10:00 minutes after 10:00.

(Ten-minute recess.) [372]

LEO RODONI

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and to the jury, Mr. Rodoni? A. Leo Rodoni.

Q. Speak up so we can all hear you.

A. Leo Rodoni.

Q. Where do you live, Mr. Rodoni?

A. 319½ North Alabama.

Q. Here in Butte, Montana? A. Yes, sir.

Q. How long have you lived here in Butte?

A. Oh, about 34 years.

Q. Married? A. Yes, sir.

Q. Do you have a family? A. Three boys.

Q. And what is your business or occupation?

A. Well, at the present time, janitor.

Q. Employed by whom?

A. By Safeway.

Q. How long have you worked for Safeway, Mr. Rodoni?

A. It will be three years this fall some [373] time.

Q. During that time have you had any duties pertinent to taking care of the floors?

A. Yes; that is my work.

Q. That is your work? A. Yes.

Q. Have you ever worked on the floor at the East Granite Street store here in Butte?

A. Yes, sir.

(Testimony of Leo Rodoni.)

Q. In the month of June, and prior to that time, 1958, had you worked there at the East Granite Street store? A. Yes.

Q. For how long had you been working on the floors there at the East Granite Street store as of June, 1958? A. Well, I think about——

Q. When did you first start working on the floor at the East Granite Street store?

A. When I first started working for Safeway.

Q. Almost three years ago?

A. Yes; that was my first place I work.

Q. Now, do you recall as of June, 1958, what your schedule of work there at the store was?

A. Well, my schedule of work starts from Monday. That is the first place I do.

Q. I can't hear you, Mr. Rodoni.

A. My schedule is that I clean the East Granite place Monday [374] night.

Q. Any other night of the week?

A. At that time on Thursday.

Q. Did you work on any other floors in the Safeway Stores other than at East Granite Street?

A. Yes; I used to have the West Park, East Park and Harrison Avenue at that time.

Q. Did you clean those on other nights of the week? A. Yes, sir.

Q. Now, as to this East Granite Street store, you cleaned it on Monday night and on Thursday nights? A. At that time.

Q. Now, what time of the day, what time did that cleaning start, when did you start the job?

(Testimony of Leo Rodoni.)

A. My job started cleaning up after the store is closed, after 6:00 o'clock.

Q. Is that after the store is actually locked?

A. Yes; more or less after 6:00 o'clock.

Q. Directing your attention now to June of 1958, will you tell the Court and jury how you cleaned that floor? A. How did I do my work?

Q. Well, from the time you come in until the time you leave, what do you do to the floor?

A. Well, if you want me to explain, from the time that I come into the store until the [375] finish——

Q. Right.

A. The first thing, I usually come in before 6:00 o'clock because I got to get my things ready in the back room and everything like that. Then when I got everything ready and the store is locked and everybody is gone, I start working on the front.

Q. Right. Now, when you start working in the front, what is the first thing you do, Mr. Rodoni?

A. The first thing is mop it.

Q. Now, will you describe to the Court and jury how you mop it?

A. Well, more or less everybody knows how you mop, but I got a mop, wet it, wet the floor down, and then I dry it up.

Q. Now, will you describe the equipment that you have, where do you get the water from to mop the floor?

A. Oh, I got a big can, about a 20-gallon can.

Q. Now, that can, is that on any kind of a cart

(Testimony of Leo Rodoni.)

of anything, how do you carry a 20-gallon can of water?

A. Well, it is on a cart that you push.

Q. And does this equipment have anything to squeeze out the mop?

A. Yes; they got a regular mop squeezer they call it.

Q. Well, you just tell the Court and jury—I know this may sound simple—just what you do with the mop and what you do to the floor? [376]

A. Well, first I dip the mop into the can, and then I put it on the mop squeezer, on account of, you know, there is a lot of water in a big mop like that, so I squeeze out part of the water, and then I start cleaning up the floor.

Q. And do you have—what's in the water, if anything, just plain water?

A. No; I got some soap.

Q. Soap and water? A. Soap and water.

Q. And then you mop the floor, and then what do you do to the floor? A. Then I dry it up.

Q. What do you dry it with, Mr. Rodoni?

A. The same mop, but I squeeze it real dry with the mop squeezer.

Q. Now, what portion of the floor are you talking about in the store with this mopping, cleaning it up? A. What part?

Q. Yes. A. All around.

Q. Where the customers go, the front part of the store?

A. I usually start in the back.

(Testimony of Leo Rodoni.)

Q. I see, but that part would be cleaned by the time you get through with the whole store that the customers walk in? A. Yes, sir. [377]

Q. Okay, then after you mop the floor, then what do you do?

A. After I got through mopping?

Q. Yes. A. Then I apply the wax.

Q. And will you describe how you apply this wax?

A. I got a sprinkler, one of these garden sprinklers.

Q. Did you bring that with you?

A. Yes, sir.

Q. Would you mind getting it and showing us how—did you bring that mop, too?

A. Yes, sir.

Q. Would you mind getting that, too? You have there what looks like a regular garden sprinkler can. What is that thing?

A. That's what it is.

Q. What do you use it for?

A. To apply the wax on it.

Q. All right, go ahead and unwrap the other package, and then you can resume your testimony.

(Witness does as requested.)

Q. You can just stay right there, Mr. Rodoni. Now, as I understand your testimony, after you have mopped the floor, then you wax it?

A. Yes, sir.

(Testimony of Leo Rodoni.)

Q. Now, at that time, is the floor still wet or dry, or what [378] is the fact?

A. Oh, the floor is dry, sir.

Q. Now, just what do you do in waxing this floor? Describe that.

A. The first thing I do is to damp this mop here with the wax.

Q. Now, where had you gotten the wax for your little can there, the sprinkler can?

A. Where I get the wax?

Q. Yes. A. From a five-gallon can.

Q. And where is that kept?

A. Back in the back room.

Q. Back in the janitor's quarters there?

A. Yes, sir.

Q. All right, now, you have the wax in the little can and you are ready to begin waxing the floor. Now, explain to the jury how you work it?

A. Well, I wet this mop here (indicating) first, because on account of from one mopping to the other, it gets dry and stiff——

Q. Right.

A. So, I wet this first so it will be nice and soft.

Q. And then what do you do, Mr. Rodoni?

A. Then I take the can, the sprinkler can, and I go around [379] the store and sprinkle it down.

Q. Show us just how you do, just do it. Assume this is an aisle down here, right down through here in front of the jury, how would you do that?

A. I would go pretty fast. (Demonstrating.)

(Testimony of Leo Rodoni.)

Q. Walk along at a regular pace, and apparently with sort of a circular motion?

A. Yes.

Q. Okay; would you go ahead, Mr. Rodoni? What—does that put wax on the floor?

A. Yes, sir.

Q. This is apparently liquid wax?

A. Liquid.

Q. Then what do you do, Mr. Rodoni?

A. Then, after I got through with that, my mop is nice and soft, and I smooth it out, and I just go right along with this one (indicating).

Q. Just show us the way you do that.

A. I just push it like this (demonstrating), light and even.

Q. It looks to me like you are pushing right straight ahead?

A. Right straight ahead, not much pressure.

Q. Not much pressure?

A. Just like this (demonstrating).

Q. Okay; mop her up on the way back. Now, I noticed you are [380] walking at an ordinary pace?

A. Yes, sir.

Q. Do you do any scrubbing around with the mop? A. No, sir.

Q. Just straight up and straight back?

A. Yes, sir.

Q. Now, how much wax do you put on that floor in this operation, and by that floor, I mean the entire floor area that the customers walk on?

A. Well, it is according, some time, to the con-

(Testimony of Leo Rodoni.)

dition of the floor, but more or less I could say around a quart or a little over a quart.

Q. Approximately a quart of liquid?

A. Yes.

Q. And that's gotten out of this big five-gallon can?

A. That's right; out of the five-gallon can.

Q. You may sit up in the chair there. Now, you do that over the whole floor, or what is the fact?

A. I do that all over the floor.

Q. And what time of the day or night is this done? A. It is done after 6:00 o'clock.

Q. What time would you ordinarily be through with this waxing operation, Mr. Rodoni?

A. Oh, I usually be through around 9:00 o'clock.

Q. Now, how long does it take that stuff to dry? [381] A. This wax here?

Q. Yes.

A. Well, if you really want to walk on it, you can walk on it after 30 minutes.

Q. How many minutes? A. 30 minutes.

Q. Now, how about if it sets for an hour or two?

A. Well, that's better yet.

Q. How about all night long until the next morning? A. That is still better.

Q. I don't suppose you remember the particular night you waxed this on June 23rd, Monday, June 23, 1958?

A. Well, I remember if it was a Monday night.

Q. Do you remember the particular operation, the particular job you went through that night?

(Testimony of Leo Rodoni.)

A. I always do the same work, the same operation.

Q. Do you buff it? A. No, sir.

Q. Any mechanical process, any machinery used in this thing at all? A. No, sir.

Q. Just what you have described?

A. Just what I got there.

Q. Just what you have showed us here?

A. Yes, sir. [382]

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. When did you quit waxing the floor on Thursday nights at the West Granite Street store?

A. Oh, it might have been about three months ago.

Q. Now, can you say whether or not a waxed floor when wet is more slippery than when it is dry?

A. Well, it all depends. If you put the wax on when the floor is still wet, then it is pretty slippery.

Q. Now, I have in mind another question along the same line. But assume now that you waxed the floor and it is dried properly, if you spill water on it or have wet feet, can you say whether or not it would be more slippery from being wet than if no water was on it?

A. If the wax is really hard, water won't affect it because it takes quite awhile for water to dilute this kind of wax.

(Testimony of Leo Rodoni.)

Q. You would say so far as a person—if you spilled a bucket of water on the floor after it was waxed, and somebody stepped on that area, it would be no slipperier than where it was dry?

A. Not that I know of unless the water has been sitting there for quite some time.

Q. The water would tend to dilute the wax, is that correct? A. That's right, sir. [383]

Q. How fast does this wax you have dry?

A. Well, like I stated just a minute ago, you could walk on it in 30 minutes.

Q. You walk along with a sprinkling can, and you use a circular motion? A. Yes, sir.

Q. Does the wax you get on get on every portion of the floor by doing it that way so it is spread uniformly?

A. When I go through with the mop, yes, sir.

Q. No; to begin with, with the sprinkling can?

A. No; there is a little bit more one place than another when sprinkling with the can.

Q. Do you make any attempt to put more in the center of the aisles than the edges?

A. Yes.

Q. When going through with the sprinkling can?

A. Yes.

Q. What is the reason for that?

A. To stay away from the edges of the fixtures.

Q. Can you say whether or not the wax tends to wear out faster in the center of the aisles than it does on the edges? A. That's right, sir.

Q. You can observe that when you are cleaning?

(Testimony of Leo Rodoni.)

A. I see that it is wearing out where you walk on it.

Q. So you try to concentrate more of your wax in the more [384] worn spots, is that true, in putting it on?

A. Yes; I always stay away from the edges of the fixtures.

Q. How far away from the edges do you stay?

A. About three inches, three or four.

Q. Now, getting back to this question of the wax drying—maybe if I used the word setting up, so that it would be partly dry. Can you say how long it takes—if you didn't buff this at all, and you just left the wax as you poured it, do you know how long it would take for it to dry under those circumstances?

A. If I don't smooth it out with the mop?

Q. Yes.

A. Just leave it set the way I sprinkled it?

Q. Yes.

A. It would take a lot longer. It all depends on—

Q. How thick it is?

A. —how thick it is.

Q. So if in going over it with the mop, you happened to miss a spot—I am not saying you do, but assume you did and it was just the way it came from the can, that spot would remain wet, it wouldn't dry as fast as though you smoothed it out, is that correct?

A. It would take a little longer to dry, yes, sir.

(Testimony of Leo Rodoni.)

Q. Now, have you ever done anything to remove old wax there at the Granite Street store other than just mop? [385]

A. Have I done anything to remove it?

Q. Yes. A. I did remove some wax lately.

Q. Did you do that before June 24, 1958?

A. No.

Q. The manager, Mr. Frazer, stated about two months before June 24, 1958, some extraordinary steps were taken to remove accumulated wax. Do you recall that incident at all?

A. Oh, more or less. You know, if I got some extra time, I go around and pick some up.

Q. How do you do that?

A. Well, I wet it first with the water, hot water, you know.

Q. More hotter than you use when you mop it regularly? A. Yes; really hot.

Q. Do you put any preparation in that hot water you use to dewax?

A. I used to use a little lye to dewax it.

Q. You don't use that as a regular thing, the lye? A. No.

Q. You do observe that the wax has a tendency to build up, is that correct?

A. Oh, absolutely, if you don't walk on it, if you don't wear it, it builds up in time.

Q. So if you put on more later, it will build up to more wax, and you will eventually have to remove some of it, is that [386] correct?

A. That's right.

(Testimony of Leo Rodoni.)

Q. And you did that in the Granite Street store some time within the last couple months?

A. Dewax?

Q. Yes; take some of this old wax off?

A. Yes; I did.

Q. I take it from your answers, you have done that before, this isn't the only time?

A. Like I say, if I had some extra time, I used to go and pick up some where it was the worst at that time, see.

Redirect Examination

By Mr. Poore:

Q. How many times do you wax the floor there at the West Granite Street store?

A. How many times do I wax it?

Q. Yes; per week.

A. Well, I wax it once a week, all the store, and then once I just wax the floor part where there is the check stand and where there is more traffic.

Q. Now, Mr. Erickson asked you about the building up of this wax. In what part of the floor does the excess wax build up?

A. Well, to explain better where it would build up the most is like underneath here [387] (indicating).

Q. In other words, not where people walk, but under the edge of the fixtures?

A. No; it never builds up as it would under there. It would sometimes build up a little bit where you would walk.

(Testimony of Leo Rodoni.)

Recross-Examination

By Mr. Erickson:

Q. You say there is a change in the method of waxing, that prior to a year ago you waxed the whole store twice a week, is that correct?

A. Two years ago.

Q. You waxed it Monday and Thursday nights, and now you don't wax it Thursdays, is that correct?

A. I don't work on Thursday any more.

Q. But before this change, you waxed the whole store twice a week? A. Yes.

Q. Before——

A. Sometimes I did, and sometimes I didn't. It is all according to the shape the floor was in.

Q. The night you don't wax it all, you said you wax the area by the check stand twice a week, out in front of the check stands, is that what you said?

A. At the present time.

Q. How big an area is that? I don't know whether any of [388] these pictures will show it. This picture is No. 11. A. Yes.

Q. This shows the back of the check stands, Mr. Rodoni. Now, here is the front of the store (indicating)? A. Yes, sir.

Q. You would wax the area out in front of the check stands, is that correct, on the other night?

A. By the main door.

(Testimony of Leo Rodoni.)

Q. What about in front of the fruit and vegetables?

A. That's right; I come down in here (indicating).

Q. Past the fruit and vegetable stand, is that correct? A. Yes.

Q. Do you go into the aisle where the fruit and vegetable stand is? A. Yes.

Q. Here is the beginning of the aisle going down toward the coffee and stuff (indicating). Now, on this other night besides Monday, how far down that aisle do you go?

A. I just go about half ways here (indicating).

Q. You are now designating you go about to where the marks "1" and "X" are on Exhibit 11, is that correct? You drew a line through "1" and "X"? A. Yes, but I don't go down.

Q. But you don't go down the aisle itself?

A. No. [389]

Q. Insofar as that area around the front of the store and where these marks are on Exhibit 9, you wax those twice a week, but the rest of the store you only wax once a week unless there is some unusual condition, is that correct?

A. That's right.

Mr. Erickson: That is all.

Mr. Poore: May Mr. Rodoni be permanently excused, your Honor?

Mr. Erickson: He may as far as the plaintiff is concerned.

The Court: You may be excused, Mr. Rodoni, you can go now.

(Witness excused.)

Mr. Erickson: I wonder, your Honor, since these items, particularly the sprinkling can, were so prominently displayed here, and reference directed to them in the description, if I might not be within my rights to suggest to counsel that the jury is entitled to have them as exhibits?

The Court: You can offer them, or counsel can offer them, take your choice.

Mr. Poore: I hate to take them away from him, interrupt his operations.

Mr. Erickson: I assume that Safeway might have quite a supply of them.

The Witness: Those belong to Safeway.

Mr. Poore: I guess we can volunteer the mop and can. We will offer them in evidence. [390]

The Court: They are admitted.

(Defendant's Exhibits 30 and 31 received in evidence.)

DR. JOHN G. DAVIDSON

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and jury, please, Dr. Davidson. A. John G. Davidson.

Q. What is your business or occupation?

(Testimony of Dr. John G. Davidson.)

A. Orthopedic surgeon.

Q. And how long have you lived here in Butte?

A. Well, off and on for the past 30 years.

Q. Married? A. I am.

Q. Do you have a family?

A. Two children.

Q. Where did you receive your medical training, Doctor? A. University of Minnesota.

Q. And when did you get your degree in medicine?

Mr. Erickson: I am prepared to admit the doctor's qualifications as an orthopedic surgeon.

Mr. Poore: Thank you, but I prefer to let the jury hear [391] it.

A. I received my medical degree in 1942.

Q. And that was from what university, sir?

A. University of Minnesota.

Q. Thereafter what medical training did you have, Doctor?

A. I spent four years in the service doing all kinds of medical work. I then practiced as a general practitioner in Minneapolis for about one year, a general practitioner in Cadillac, Michigan, for about two and a half years, then I started my training in orthopedic surgery.

Q. Is orthopedic surgery a specialty, Doctor?

A. It is.

Q. How would you define orthopedic surgery?

A. Orthopedic surgery is that branch of medicine that has to do with the treatment of bones and joints.

(Testimony of Dr. John G. Davidson.)

Q. Am I correct in this, then, Doctor, after being a general practitioner for a number of years, you took further study in orthopedic surgery?

A. I did.

Q. Where did you take that study, Doctor?

A. Veterans' Hospital in Minneapolis, the University of Minnesota hospitals, the Shriners' Hospital for Crippled Children in St. Paul, and the Minnesota State Hospital for Crippled Children in St. Paul.

Q. What period of time was consumed in your studies there? [392]

A. That took approximately four years.

Q. And what, if any, additional degree did you obtain in medicine at the end of that time?

A. No further medical degree, just the right to apply to the American Academy of Orthopedics to become a fellow of the American Academy of Orthopedics.

Q. Did you so apply? A. I did.

Q. Did you become a member of the Academy?

A. I did.

Q. You are still a member in good standing?

A. I am.

Q. Do you belong to any medical societies or organizations, Doctor?

A. The American Medical Association, the American Academy of Orthopedics, the American Board of Orthopedics, the American College of Surgeons, the Western Orthopedic Association, and the local Montana and county organizations.

(Testimony of Dr. John G. Davidson.)

Q. Now, Doctor, is your practice limited to your specialty? A. It is.

Q. You are not a general practitioner?

A. No.

Q. Are patients referred to you by general practitioners? A. They are.

Q. Now, Doctor, at our request, did you examine Miss Mildred [393] Murphy, the plaintiff in this case? A. I did.

Q. Can you state when you examined Miss Murphy? A. May I use my notes?

Q. Yes, sir.

A. Miss Murphy was examined on March 4, 1959.

Q. Now, Doctor, did you make an examination of the cervical spine of Miss Murphy at that time?

A. I did.

Q. Now, Doctor—excuse me just a second, Doctor.

Mr. Poore: As to the pathology of the bones of the skull, there is no issue?

Mr. Erickson: No issue.

Mr. Poore: Would you like to go into the nerve and muscular areas of the head so far as the doctor's examination is concerned?

Mr. Erickson: I don't think so.

Q. Very well. Now, Doctor, as to the cervical spine, did you make an examination of Miss Murphy? A. I did.

Q. And would you describe how that examination was made, and what your findings were?

(Testimony of Dr. John G. Davidson.)

A. I had Miss Murphy sit in a chair, or on the examining table, I don't remember which, and had her move her neck, of which the cervical spine is the bony portion, I had her move [394] that in all directions to see if there was any loss of motion in the cervical spine.

Q. Did you notice any loss of motion, Doctor?

A. There was full range of motion in all directions.

Q. Go ahead with your report, Doctor?

A. The patient stated that the neck hurt when she did move her head and neck through the range of motion. I examined the muscles in the back of her neck and the front of her neck to see if there was any spasm or tightness, and found none.

Q. Now, Doctor, is there a difference between subjective and objective findings?

A. There is.

Q. What are subjective findings?

A. Subjective findings are those findings which the patient complains of, but the examiner does not necessarily see.

Q. Now, what is an objective finding?

A. An objective finding is the findings that the examiner is able to determine or see while he is making the examination.

Q. Now, Doctor, when you asked Miss Murphy to move her neck and she moved it through the full range of motion, you indicated that she complained of it in certain areas of the motion. Is that subjective or objective?

(Testimony of Dr. John G. Davidson.)

A. That would be a subjective finding.

Q. Thereafter, I believe you said you checked the patient, [395] Miss Murphy, as to any muscle tightness or muscle spasm, is that correct?

A. That is correct.

Q. Now, is that a subjective or an objective finding?

A. If spasm had been present, that would have been an objective finding.

Q. Was there any spasm present?

A. I found none.

Q. Did you find any objective symptoms corroborating the complaint of pain in the movement of the neck? A. I did not.

Q. Go ahead with your report, Doctor.

A. After examining the muscles in front of the neck and in back of the neck, I had the patient move her shoulders, elbows, wrists and hands to test for motion. These were all within the normal limits. I tested the upper extremities, or the arms, for strength, and the strength of the arms were within normal limits. I tested the arms for reflexes, and this was normal. I also tested the arms with a pin point to see if there was any change in sensation or feeling in the arms, and this was normal.

Q. Doctor, in the testing of these muscles and tissues of the upper shoulders, arms and neck, did you find any atrophy or withering of any tissues?

A. I did not. [396]

Q. Any abnormality whatsoever tending to weaken or incapacitate a person?

(Testimony of Dr. John G. Davidson.)

A. Nothing that I could find.

Q. Now, Doctor, did you also take an X-ray photograph of the cervical spine?

A. Yes. I did not take them myself. They were taken by my technician under my supervision.

Q. Do you have the X-rays with you, Doctor? Maybe we can mark them all at this time.

(Witness produces X-rays.)

Q. Doctor, I believe you stated that you took an X-ray photograph of the cervical spine, that is, the neck area, of Miss Murphy. I hand you Defendant's Exhibits No. 33, No. 34 and No. 32, and ask you if you can identify those exhibits?

A. Can I put them up there?

Q. Certainly.

A. X-ray, or Exhibit 32 is a radiograph of Miss Murphy's neck bones——

Q. Now, just a second. Now, this X-ray was taken under your supervision and control?

A. It was.

Mr. Erickson: I have no objection. I will make no objection to any of them, I don't think.

Mr. Poore: We offer in evidence Defendant's Exhibits Nos. 32, 33 and 34. [397]

The Court: They are admitted.

(Defendant's Exhibits 32, 33 and 34 admitted.)

Q. Now, Doctor, would you proceed with your explanation?

(Testimony of Dr. John G. Davidson.)

A. Exhibit 32 is a radiograph of Miss Murphy's bones of the neck taken with the X-ray on one side of the patient and the X-ray plate on the opposite side, a side to side view, which shows Miss Murphy's neck bones with her head tilted backward. And on this film we can see the complete cervical spine, the bones of the neck. There is an abnormality of the disc space between the fifth and sixth neck bones. This is more narrow (indicating) than the spaces above and below those two particular neck bones. There is also a very minimal amount of arthritic spurring noted in this same area. Otherwise, there is no evidence of any recent or old fractures or other bony pathology.

Q. Thank you, Doctor. Now, as to the other X-rays of the same area, is there anything shown in those areas indicating—in those X-rays indicating any abnormality?

A. Exhibit 33 is a radiograph of Miss Murphy's neck bones, taken with the X-ray in the front and the plate at the back of the neck, and it shows nothing of note. It is not a good X-ray for explanation in a case like this. Exhibit 34 is another side to side view of Miss Murphy's neck bones, and here again we see the same changes in the neck bones as we previously described. Also, on this film we see a little [398] change in the curve of the neck as the head is bent forward. No evidence of any recent breaks, fractures or dislocations can be seen.

Q. Thank you, Doctor. Did you also make an examination of the tissues, muscles, tendons and

(Testimony of Dr. John G. Davidson.)

bones of the lumbar spine and back area of Miss Murphy? A. I did.

Q. Now, confining your attention only to the—in the interests of time, Doctor, I won't ask you about the dorsal spine, other than if you noticed any arthritic changes in the dorsal spine?

A. There were arthritic changes noted on the X-ray, yes.

Q. Now, Doctor, did you also make an examination of the muscles, tissues, tendons and bony structure of the lumbar or lower spine of Miss Murphy?

A. I did.

Q. Would you describe the tests that you had Miss Murphy perform, and what your conclusions were from those tests, in other words, your examination, Doctor?

A. I had Miss Murphy stand up and pressed quite vigorously over all the vertebrae from the neck down to the tailbone, and she did complain of some tenderness over the first and fifth lumbar vertebrae, or the first vertebra in the low back and the last vertebra in the low back.

Q. Is that a subjective or an objective [399] finding? A. That is a subjective finding.

Q. Proceed, Doctor.

A. There was also slight tenderness when pressure was applied over the left buttock, and along the course of the left sciatic nerve, or along the back of the left leg. The patient again complained of some tenderness.

(Testimony of Dr. John G. Davidson.)

Q. Did you perform any tests as to the verification of those subjective findings, Doctor?

A. I did, I had the patient go through a range of motion with the lumbar spine and found that she was able to bend forward completely, but that she complained of some pain when she was at the very extreme of bending forward. I had her bend backwards as far as she could. She was able to do this within the normal limits, and again she complained of some pain in the area of the first lumbar vertebra. The patient then bent to the left side and the right side, and she was able to bend completely in both directions, but again she complained of pain on the extremes of this motion, or at the very end of the motion. I then had her walk on her heels and toes to see the strength of the muscles that make the heels and—or make the foot function. She was able to walk on her heels and toes, but complained of some pain in the low back area when doing this. I then squeezed her neck near the jugular vessels to see if any referred pain could be noted in the back or down the legs, and no pain was noted. I then [400] tapped her on top of the head to see if any referred pain was found in the low back or in the back. Again none was noted. I tapped her knees and ankles with a small rubber hammer to see how her reflexes were, and they were within normal limits. I then did a straight leg raising test, which is a test to check for irritation of the nerves or back irritation, and the test is carried out by having the patient lie on their back

(Testimony of Dr. John G. Davidson.)

flat with the legs straight out, and then the leg is grasped by the heel and raised up, and usually if there is irritation of the sciatic nerve or back pain, the patient will complain of pain in the back, or in the back of the leg as this leg is raised up. That patient had no pain whatever when the straight leg raising test was carried out. I then did a Lasaque's test, which is another test similar to the straight leg raising test, to check the straight leg raising test, and this was also within normal limits. A Patrick's test, or a test to check the hips, was then done. This test is done by putting the right heel on the left knee, and then bending the leg outward. The test was positive on the left and negative on the right. I then checked the patient's sensation in the lower extremities and found this to be within normal limits. I checked the strength of the muscles of the great toes, or the big toes, and this was also within normal limits. I did a Romberg test, or a test to show Miss Murphy's balance, as she had complained that she could not keep her [401] balance. This is a test where the patient puts her heels together and stands straight up and closes her eyes. If there is some difficulty with the part of the brain that keeps the patient in balance, after having their eyes closed a short time, they will start swaying, and oftentimes will fall over if they are not caught. Miss Murphy passed this test and did not sway or fall. I then had her stand on one leg with her eyes closed, and she was able to balance on one leg. I

(Testimony of Dr. John G. Davidson.)

had her stand on the opposite leg, and she was able to balance on that leg and had no difficulty.

Q. Now, Doctor, am I correct in this that in your initial examination of palpation or feeling, you said you pressed along Miss Murphy's lower spine with your fingers and you said you elicited subjective symptoms, is that right?

A. That is right.

Q. Now, you described the various tests you performed subsequent to that. Are those for the purpose of corroborating or raising a question as to the subjective findings? A. They are.

Q. Now, did you find any objective—were there any objective findings corroborating any pain along the sciatic nerve? A. There was none.

Q. Or in the limitation of motion, the pain that was complained of on forward and backward bending there, was there any objective corroboration of that? [402] A. None that I found.

Q. Now, Doctor, what is the sciatic nerve?

A. The sciatic nerve is a group of nerves that come from the lower portion of the back and go together or unite just at the buttocks, and then they travel down the back of the leg as one large nerve.

Q. Is that one of the largest nerves in the body?

A. It is the largest nerve in the body other than the spinal cord.

Q. Did you bring your little Junior along with you? A. Yes.

Q. Would that be of assistance to the jury in seeing where the sciatic nerve takes out?

(Testimony of Dr. John G. Davidson.)

A. This is a plaster model of the lumbar spine, or lower part of the spine and sacrum and tail-bone. This rubbery thing in here (indicating) represents the spinal cord. These little rubbery things (indicating) represent the nerves as they come out from the spinal cord, come out the little holes alongside the vertebrae. As these little nerves come out alongside the vertebrae, as they get down to about here (indicating), they all go together, and form one large nerve, and then as they go down the buttocks and down the back of the leg, they remain as one large nerve until they get just behind the knee, just above the back of the knee, and then they start spreading out again. [403]

Q. Now, Doctor, these various tests you described like the Lasaque's test, the tapping the patient on the head, the straight leg test, etc., now what relationship, if any, do those tests have to the nerve system that you just described?

A. Well, when we do the straight leg raising test, that puts the sciatic nerve on the stretch, and if the nerve is irritated or pinched or pressed on by a ruptured disc, or by an arthritic spur when the nerve is stretched, they have pain. And also with the Lasaque's test, it is somewhat the same, and again they will complain of pain when this test is carried on.

Q. Am I correct in this, Doctor, that the various tests you have performed that you just described to the jury directed at the lumbar spine were negative tests?

A. They were.

(Testimony of Dr. John G. Davidson.)

Q. You may resume the stand. Did you take X-rays of the lumbar spine, Doctor?

A. I had my technician take one.

Q. Are you able to identify it from this group of exhibits, Doctor? We might pull out the lumbar, not the lumbar, but the dorsal. If you would step to the shadowbox again, Doctor, and identify these. I hand you Defendant's Exhibit No. 39, and ask you if you know what that is?

A. This is Exhibit 39, it is a radiograph of Miss Murphy's low back and pelvis. [404]

Q. And, Doctor, was that taken under your supervision and control? A. It was.

Q. It truly and accurately portrays the condition it purports to portray? A. It does.

Mr. Poore: Offer in evidence Defendant's Exhibit No. 39.

Mr. Erickson: No objection.

The Court: It is admitted.

(Defendant's Exhibit 39 admitted in evidence.)

A. This picture of the bones of Miss Murphy's lower back and pelvis was taken with the X-ray tube in front of the patient and the plate at the back, a front to back picture. It shows the vertebrae of the lower spine, pelvis and hip joints.

Q. Describe any pathology, that is, any abnormality, as I understand the word, shown there, Doctor?

A. There is a little rotoscolosis—roto meaning

(Testimony of Dr. John G. Davidson.)

rotation, scolosis meaning curve—in the spine of this patient. It is a very minimal curve. If you look at this (indicating), the curve is facing this direction and there is a slight curve in this spine.

Q. In your opinion, what is the origin of that type of slight abnormality? [405]

A. With this type picture, it could be just the position on the X-ray table, it could be a mild change that this patient's spine has undergone through the years, it could be from a spasm of the paravertebral muscles, or the muscles around the spine.

Q. Did your examination satisfy you as to what the cause of this slight abnormality is, Doctor?

A. I found no spasm of the paravertebral muscles or the muscles around the spine, so I would have to eliminate that as a cause. It was either a position change, or a change that has occurred during the patient's growth.

Q. Doctor, are there any other abnormalities shown there?

A. There is very minimal arthritic spurring. I see a little tiny sharp point here (indicating), very minimal. The hips are within normal limits.

Mr. Erickson: May I inquire, so the record shows, what vertebra you are referring to when you say you saw a minimal arthritic change?

A. I think we could say on all the lumbar vertebrae. They are very minimal. The fourth shows a little more than the rest, and perhaps the fifth.

Q. (By Mr. Poore): Now, Doctor, is there any-

(Testimony of Dr. John G. Davidson.)

thing else on that? A. No.

Q. I hand you Defendant's Exhibits 37 and 38, and ask you [406] if you will identify those?

Mr. Erickson: I have no objection to those.

Mr. Poore: We offer Defendant's Exhibits 37 and 38 in evidence.

The Court: Admitted.

(Defendant's Exhibits 37 and 38 received in evidence.)

Q. Will you explain those?

A. Exhibit 37 is a spot film, or a special coned down film of Miss Murphy's very low back and tailbone area, and these show no evidence of any recent or old fractures. The intervertebral spaces may be slightly narrowed in the very back, the intervertebral disc space being the disc space between the bones, but if we compare this space, the space between the fifth lumbar vertebra and the sacrum, if we compare the back part of this space and this space and this space (indicating), it is practically the same. This space (indicating) may be slightly wider, but very little, if any.

Q. Anything else in that X-ray?

A. Well, on here we can see a very little arthritis, a little bit there and a little bit there (indicating), and that is the only thing I could find.

Q. Now, Doctor, on Defendant's Exhibit 38, would you identify that, please?

A. That is a side to side view of the lower back bones of Miss Murphy, and we do see a little more

(Testimony of Dr. John G. Davidson.)

arthritic changes [407] up in the first lumbar and the twelfth dorsal vertebrae. There is also very minimal arthritic changes noted in the second and third lumbar. The disc spaces are essentially the same as on this (indicating). In fact, this is essentially the same picture in the low part of the back.

Q. Thank you, Doctor. Now, Doctor, am I correct, then, that you examined the entire spinal column of Miss Murphy, both as to bony and muscle structures? A. I did.

Q. And would you again summarize what, if any, abnormalities you noticed in that length of her spinal column, as to both bony and muscular structures?

A. I noticed she had very minimal arthritic changes throughout the entire bony structure of the spine, and that there was, perhaps, some narrowing of the disc space between the last lumbar vertebra and the sacrum.

Q. And in the cervical spine, any narrowing of the discs?

A. There was also some narrowing of the disc between the fifth and sixth cervical vertebrae.

Q. Now, Doctor, in your opinion, based upon your examination of the muscular structure and the bony structure of this patient, do you have an opinion, based on reasonable medical certainty, as to whether this person could carry on the job of waitress?

(Testimony of Dr. John G. Davidson.)

A. From my examination, I would say she [408] could.

Q. Now, Doctor, would you mind stepping down here again? I would like to show you some X-rays you haven't seen.

The Court: I think if you are going to start on that, it is time to take a short recess and stretch ourselves. (Jury admonished.) Court will stand in recess until quarter after 11.

(Ten-minute recess.)

Q. Doctor, would you mind stepping down here, please? Doctor, there has been admitted in evidence Defendant's Exhibits No. 19 and No. 26, both of which are X-rays involving the cervical spine taken on or about June 24, 1958, and September 26, 1958. Now, I hand you Defendant's Exhibit 19, taken on or about June 24, 1958, and ask you if you notice any different pathology than you have described from your own X-rays taken in March, 1959?

A. Well, we again see the narrowing of the interspace between the fifth and sixth neck bones, with some arthritis. I would say these are comparable to the films taken in my office.

Q. Do you notice any increased narrowing of the fifth and sixth joint space?

A. As compared to the films I took?

Q. Yes, as compared to the films you took.

A. May I put my film up?

Q. Yes. [409]

(Testimony of Dr. John G. Davidson.)

A. This film was taken 6-24-58 (indicating); my film was taken 3-4-59. Any increased narrowing—

Mr. Erickson: May I make an objection to the explanation from the doctor as to the conditions under which the two pictures were taken? I think his was taken—

The Court: Well, he will make his explanation, and you can cross-examine him on any differences you observe.

A. May I answer?

Mr. Poore: You may answer, Dr. Davidson.

A. If there were to be any increased narrowing, we would have to find it in my films because if this is a progressive thing, it should be more narrow in the films taken almost a year later, and I would say that the width of the interspace that was narrowed is practically the same on the original film as on the film taken in my office.

Q. So am I correct in this, Doctor, that there has been no progressive change?

Mr. Erickson: I object because the Doctor has answered the question, and counsel has misstated the response made by the doctor.

Mr. Poore: Then I will ask the question again, Leif.

Q. No progressive change in the pathology of this patient from June of 1958 to March of 1959, as to the cervical area of the spine so far—

Mr. Erickson: My objection is based on the preceding [410] answer given by the doctor when he said they are practically the same, and this is a

(Testimony of Dr. John G. Davidson.)

restatement of what the doctor is supposed to have said. It is not an accurate statement.

The Court: It is leading. Just ask the doctor the question with reference to that.

Q. Would you indicate if there is any change between the X-rays of June, 1958, and March, 1959?

A. I can see no definite change. The technique in the films are a little different. This one (indicating) is slightly more clear than this (indicating), but if I were to have to say yes or no, I would say there is no definite change.

Q. Now, Doctor, is there any evidence in either of these as to any fracture, compression or otherwise?

A. I can see no evidence of any recent or old fractures in these pictures.

Q. Now, Doctor, I place in the shadowbox along with your picture taken in March of 1959 another X-ray taken in September of 1958, and ask if there is anything in the comparison of those two X-ray photographs that calls for a different conclusion than you have already stated?

A. These two films are more comparable as far as technique is concerned. They are about the same density, and again I would have to say there is no definite change.

Q. Doctor, here again I place in the shadowbox for your examination Plaintiff's Exhibit No. 1 and your X-ray No. 32, [411] taken in March, Exhibit No. 1 being taken on April 11th—no, November 14, 1958, and ask if there is any change noted there?

(Testimony of Dr. John G. Davidson.)

A. The entire cervical spine doesn't show on Plaintiff's Exhibit 1, but we do have a comparable view of the fifth and sixth cervical vertebrae or neck bones, and I can see no change.

Q. Now, Doctor, if you could put in the lumbar photographs, your photographs, or the X-rays that you took, Doctor. Now, Doctor, would you compare the X-rays taken of the lumbar portion of the plaintiff's spine in March, 1959, under your direction and control, with that taken by Dr. Clemmons on April 7, 1959, which is Plaintiff's Exhibit No. 4?

A. May I have mine? It should be a big one like this. Plaintiff's Exhibit 4 as compared to Defendant's Exhibit 39. Do you want to take that out?

Q. Yes, sir.

A. They are reasonably the same. Again there is a slight variation in technique. Exhibit 4 is not as distinct and is more cloudy than this (indicating), and a little more difficult to read, but I would say there is no extreme change between one and the other.

Q. Here is another, Plaintiff's Exhibit No. 3, also of the lumbar or low back area, taken November 14, 1958.

A. Again there is no appreciable difference in the bony [412] picture.

Mr. Poore: You may take the stand. You may cross-examine.

(Testimony of Dr. John G. Davidson.)

Cross-Examination

By Mr. Erickson:

Q. Dr. Davidson, you spoke of the motions of the head and neck in your examination of Miss Murphy, and you spoke of it as being within normal limits. Are there different normal limits for different people, or do you have an exact standard by which you determine what is within normal limits?

A. There is no definite exact standard. Some people are short necked, some people are long necked, and there is usually a little bit more range of motion in a long necked person than in a short necked person. They all have the same number of vertebrae.

Q. Would there be a difference also in older people and younger people?

A. Not necessarily. If an older person has a considerable amount of arthritis, they may have marked limitation of motion. If they do not have any arthritis, they may have as good a motion as a young person.

Q. Then what is normal limits depends upon the opinion of the doctor who is doing the examination, is that correct?

A. That is correct. [413]

Q. Now, Dr. Davidson, you were not here—there are too many doctors in this case to keep them sorted out—you were not here when Dr. Rotar tes-

(Testimony of Dr. John G. Davidson.)

tified, nor when Dr. Clemmons testified, but Dr. Rotar testified that he treated Miss Murphy for spasm and rigidity of the intervertebral muscles as well as spasm and rigidity of the muscles around the cervical spine, and he observed those things as late as a month ago. You found no evidence of them? A. I could find none.

Q. Now, had they been present, assuming that they had been present prior to the time that you made your examination, is that the sort of thing that comes and goes, or may disappear, or are those more or less a permanent thing?

A. It can come and go. Many people with trouble in their neck will complain that their neck bothers them more when the weather changes, when it is damp, when they get cold, it can come and go.

Q. And you say that—I think your testimony is that the arthritic changes you observed in the cervical spine and in the dorsal and lumbar, you would generally characterize as minimal, is that correct?

A. You have to hunt pretty hard to find them.

Q. Now, in reading these X-rays which actually show the shadows of the bony structure, the examination of them is rather a subtle thing, is it not, Doctor, where there can be [414] a wide range of opinion among experts on what they show?

A. No; I don't think there can be a wide range. I would say if we were to take four doctors who have had much experience reading X-rays, that three out of the four would agree pretty closely.

Q. Now, in case of an examination of an X-ray

(Testimony of Dr. John G. Davidson.)

that shows minimal arthritis or a minimal trauma, it would be in an area like that that you would be apt to find greater disagreement, would that be a correct statement?

A. May I have that question again, please?

(Question read back by Reporter.)

A. I don't think so.

Q. There would be some cases, of course, where the picture was so obvious, for example, a picture of a broken femur, that doctors couldn't disagree that it was broken, isn't that correct?

A. If they have had any experience reading films.

Q. Well, in a case of a broken leg where it is broken so badly that the bone protruded out of the skin on one side and out of the skin on the other side, that would be one of those where there wouldn't be any disagreement, isn't that correct?

A. You wouldn't have to have an X-ray.

Q. Now, these changes in joint space in a backbone, normally those changes are very small, are they not, you wouldn't [415] expect to see an inch or half inch or three-quarters of an inch, or anything like that?

A. Well, the intervertebral disc space is never an inch wide. This portion that you see between the bones is approximately the width of an intervertebral disc space, so we never would see an inch change, but we often do see where the disc space

(Testimony of Dr. John G. Davidson.)

has so degenerated that the bones are almost touching, the bone above and below the disc.

Q. The model that you have——

A. Do you want it?

Q. Yes. The model that you have you say is approximately what you would expect in a normal person of average size, is that correct?

A. That's right.

Q. And the narrowing that occurs, and especially as shown in these pictures, is not a thing that you can just take a quick look at the X-ray, that is, the untrained person, and determine whether there is a change or not, isn't that true?

A. Well, if it gets so minute you can measure it with calipers, but we usually don't do that. After you have seen several hundred X-rays, you can estimate the amount of narrowing.

Q. Now, in your testimony on the cervical spine, you said you could see practically no change, and I believe that is a correct statement, between the June, 1958, pictures and the [416] more recent one?

A. That is correct. I don't think, comparing these X-rays, that you can get down to a minute measurement again. If I were to say, as I said before, if I were to say yes or no on the change, I would say no.

Q. But you say instead there is practically no change?

A. I said no because I had to be pinned down to yes or no.

Q. Now, this model, and I would assume that is

(Testimony of Dr. John G. Davidson.)

not a model that you could readily leave here as an exhibit?

A. I wouldn't like to. I use it several times a day.

Q. I wonder if it might be possible with the Court's permission if we agreed that the model might be left with the jury and returned to the Court as soon as the jury is through with its deliberations, would that inconvenience you greatly?

A. If it lasts over Monday, it will.

Q. Well, then, we will forget about it. Now, is this anatomically a correct representation of the lumbar spine and the sacrum?

A. It's within normal limits of an average lumbar spine and sacrum.

Q. And it is because it is a reasonably good anatomical representation of the area, that is the reason you use it, is that correct? [417]

A. That is right.

Q. Now, as an orthopedic surgeon, you made an examination of Miss Murphy, is that correct?

A. I did.

Q. And she gave you a history of herself as a part of your examination?

A. She did; she gave me a history prior to it.

Q. And why do you take a history?

A. Mostly because when we get to Court the lawyers ask about it.

Q. Well, will you give us that history?

A. Miss Murphy stated that while she was shopping in a Safeway Store on East Granite Street

(Testimony of Dr. John G. Davidson.)

on June 24, 1958, she fell flat on her back and struck her head against the floor. She said she slipped on the floor. She stated that she cannot remember how she got up from the fall, but upon getting up, she felt a large bump on the back of the head. She was taken to St. James Hospital by automobile, one of the store clerks driving her to the hospital. She was seen by Dr. Rotar who examined her head and took X-rays. She was given some medication by her physician and was taken home by her brother. Upon arriving home, she became sick to her stomach and remained so for two days. One day following the accident, she stated that she hurt from her head to her ankles and that she was sore all over. She again saw Dr. Rotar [418] and X-rays of the back were taken, and she continued to see him three times a week, then every two weeks until October of 1958. During this time, X-rays of the back and head were taken, that is, recheck X-rays. She has continued to see Dr. Rotar for periodic examinations until the present time. As yet she had not been dismissed from the case. The only treatment given was hot baths, hot packs and an electric pad and some medication. The patient carried this treatment out at her home.

Q. Now, it is a fact, is it not, Doctor, in your own practice you get a history of your patients, either prepared by yourself or by the referring doctor?

A. That is right.

Q. And that is a part of your regular procedure when you are going to diagnose?

(Testimony of Dr. John G. Davidson.)

A. That is part of the routine.

Q. And can you say whether or not in practice you do rely somewhat upon the history given in diagnosing the condition? A. We do.

Q. Now, in making a diagnosis as an orthopedic surgeon—I have asked a part of this question before—do you rely entirely upon the X-rays?

A. No.

Q. You have indicated that you have the history in mind, and then you say, you have told us that you also rely on certain [419] muscular tests and nerve tests, is that correct?

A. We examine these patients, and we correlate our history, subjective symptoms, objective symptoms, examination, and X-rays.

Q. Now, in the case of Miss Murphy, she gave you a considerable number of subjective symptoms as you have testified, is that correct?

A. She did, yes.

Q. Now, did you find any evidence from the subjective symptoms she gave you of any contradiction between symptoms and what she claimed her difficulties were, or what she was complaining of?

A. When I examined her, I could find nothing that correlated with her subjective symptoms. She had an almost completely negative examination.

Q. But in moving her head from side to side, she testified to certain pain when moving the head too far? A. She did.

Q. And she was consistent in that objection, is that correct? A. She was.

(Testimony of Dr. John G. Davidson.)

Q. Would that be true also of the lumbar spine, of the complaints she made there?

A. It was, the complaint was consistent.

Q. Yes; that was the point of the question. Now, if Miss [420] Murphy has pain in the lower cervical, and if the testimony shows that she is constantly pulling her head back and working on it with her hands in this manner (demonstrating), and that she complains of pain there, and inability to sleep and so on, assuming those things, do you have anything in your examination that would account for that situation? A. None.

Q. And if the record shows that Miss Murphy complains of pains in her lower back, and that she cannot stay in bed for long periods and that she cannot sit up for long periods because of pain, do you have any explanation from your examination of why that circumstance should exist?

A. None.

Q. Now, if the testimony is that Miss Murphy, prior to June 24, 1958, was an out-going, rather carefree person who liked to be out with other people and play cards, and since then she is nervous, withdrawn and irritable, do you have any explanation from your examination why that condition should exist as it does?

A. I could find no reason why she should have changed.

Q. Did you see any evidence of nervousness?

A. Not particularly, and as I watch her here, I do not see any particular evidence. I have not seen

(Testimony of Dr. John G. Davidson.)

her reach back and bend her head back or put her hands behind her neck during the whole time I have been here. [421]

Q. For the purposes of my questions, Doctor, I will ask you to assume that, and that's the basis of the questioning, if you assumed that situation is true, and your testimony is you could find no reason why she should do that from your examination, is that correct? A. That is right.

Q. As far as your examination is concerned, there is nothing wrong with Miss Murphy at all?

A. Nothing that I could find from the examination except what I have already mentioned.

Q. Now, this minimal narrowing, or the narrowing—I think you characterized it as minimal—that you found in the lumbar spine, you found that in the back of the intervertebral space, isn't that correct? A. That is right.

Q. And in your opinion, that wouldn't affect—it isn't large enough to have any effect on her, is that true?

A. It compares so much to the ones above and below that I could see no reason why it should be affecting the nerves at all. I would say it is within normal limits for Miss Murphy.

Q. Now, this model would show, since it's anatomically correct, the angle that one would expect in a normal spine between the last lumbar vertebra and the sacrum, would it not?

A. It would show the average angle, I would say. If we were [422] to take a hundred people,

(Testimony of Dr. John G. Davidson.)

this would fall in with a 15 or 20 per cent angle in either direction.

Mr. Erickson: May I have a moment, your Honor?

The Court: Yes. Doctor, do I understand your testimony to be to the effect that from your examination, you find nothing abnormal about the body of Miss Murphy, is that the situation?

A. I could find nothing that would prevent her from doing her regular work as a waitress.

The Court: From the standpoint of her body structure?

A. That is correct.

The Court: Do you mean to say that she is not suffering from any condition that might interfere with—

A. She is not suffering from any orthopedic condition. I do not feel qualified—

The Court: That's what I wanted to know, you are not talking about anything except orthopedics?

A. That is correct.

The Court: And when you say that she is not suffering from any condition at all, or that the X-rays or your examination don't disclose any abnormality—

A. I am just considering the orthopedic part of it.

Q. (By Mr. Erickson): And that answer would be the same, and you probably took into account the fact that she would have to carry heavy trays and dishes in a position away from her body,

(Testimony of Dr. John G. Davidson.)

and that sort of thing? Do you have that in [423] mind when you make that answer?

A. I do. There is such minimal changes in those X-rays that I could see no reason if she worked as a waitress before why she couldn't go back and work as a waitress now.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Doctor, have you ever visited with Dr. Hammer or Dr. Sawyer or Dr. Rotar about Miss Murphy? A. No; I have not.

Q. The first you have seen of the X-rays other than those taken under your own supervision was up here? A. This is the first time.

Q. Doctor, on the question of the consistency of the objective symptoms or the subjective symptoms, was there any consistency between the subjective symptoms and your objective findings?

A. There was no consistency.

Mr. Poore: We have no further questions.

Mr. Erickson: That is all.

Mr. Poore: May Dr. Davidson be permanently excused, your Honor?

The Court: Yes; he may; thank you, Doctor.

(Witness excused.) [424]

Mr. Erickson: I have Dr. Clemmons here only available now. His testimony will be limited to rebuttal on medical. I would like leave now to call

him out of turn before the defendant finishes his case.

Mr. Poore: The defendant rests, your Honor.

DR. HOWARD M. CLEMMONS

recalled as a witness on behalf of plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. There was one small question I forgot to ask you, Doctor. You gave your distinguished record and training and so forth and I forgot to ask you whether you are licensed to practice medicine in Montana? A. Yes, sir; I am.

Q. Doctor, since your appearance on the stand, Drs. Rotar, Sawyer, Hammer and Davidson have testified, and there are a number of additional X-rays which you have not seen prior to this time, and because there is a difference of opinion as to what the X-rays show, you have been recalled to testify primarily with relation to those X-rays, but before examining on those questions, I would like to ask you whether, as an expert, you can, by examining X-rays of spines alone, just the X-rays, diagnose matters like whether there is a [425] fracture existing or whether there are arthritic changes and the like, or do you need something more than mere X-ray information to form your opinion, generally?

A. We rely partially on history, plus clinical

(Testimony of Dr. Howard M. Clemmons.)

findings, plus X-rays, plus any other additional laboratory tests that are indicated.

Q. Generally, the X-ray is just one of the tools you use, is that correct, in diagnosing cases in which an orthopedic problem is presented?

A. That's correct.

Q. And can you say, Doctor, whether or not there is a considerable area where opinion enters into a determination of what an X-ray shows in a specific case? A. Yes, sir.

Q. So for that reason, for example, in this case, Dr. Sawyer saw rather extensive arthritic changes in the cervical spine, while Drs. Hammer and Davidson did not. Would you say that would be more or less the normal situation among the experts?

A. There is always room for different opinions.

Q. So that based on your own experience you would say that one radiologist might find a fracture in a given situation, and another one minimal arthritis, would that be a correct conclusion?

A. Are you speaking of a fresh fracture or an old fracture?

Q. Well, answer it either way, Doctor, and explain it. [426]

A. Well, in the case of a fresh fracture, there might be less room for variation of opinion than with the evidences of an old fracture as compared with the appearance of arthritis.

Q. Now, in the case of fractures, particularly of the vertebrae, and arthritis of the vertebrae, your

(Testimony of Dr. Howard M. Clemmons.)

prior testimony was that, in your opinion, the appearance of the cervical spine indicated a possible fracture of the fifth and sixth, or fifth or sixth vertebra, will you now look at your X-rays and state whether or not it is still your opinion that those vertebrae show evidence of a compression fracture?

Mr. Poore: To which the defendant objects as improper rebuttal, it is merely cumulative.

Mr. Erickson: I shall compare one of the later X-rays then after that question, your Honor.

The Court: Well, I'll have to sustain the objection, counsel. We are not going to go through all of Dr. Clemmons' X-rays again and have him tell us again what he told us the last time he was on the stand. He can rebut anything new that has been developed in the case of the defendant, but otherwise, we are not going to listen again to an examination of all these X-rays and have him tell us the same thing about them.

Mr. Erickson: I will confine the examination, then, your Honor, if that is proper, to a comparison of the X-rays of the cervical spine taken by others with his and not repeat [427] the same ground.

Q. Now, I call your attention to Defendant's Exhibit 32. Do you recognize that—I will inform you that is an X-ray of Miss Murphy which was taken on the 4th of March of this year, and have you compare it with the X-ray which is Plaintiff's Exhibit 1, and tell us first whether that shows the same general area that is covered by your X-ray?

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: To which the defendant renews the objection that it is merely cumulative of evidence already introduced by the plaintiff.

The Court: Overruled. This is comparing the new X-rays that have been introduced. Doctor, I think if you stand on the other side of the machine, the reporter can get your voice better.

A. They both show the same general area, the cervical spine or the neck vertebrae, both taken from the same position, a lateral view, a side view, and in arriving at the diagnosis I made, and in comparing the film taken—

Q. November, 1958.

A. —November, 1958, with this one on the right taken the 4th of March, 1959, the appearance of the various vertebrae must be compared, and you will notice that the lower and front margin of all of these cervical vertebrae down to the fifth show a hook-like projection in the front, and the top of the adjacent vertebrae is rather smooth and rounded off. [428] Now, when we reach this level (indicating), this beak or spur-like projection which in these other vertebrae is normal is missing from this one, from the lower and front side. It is squared off, and the top of the vertebrae below, which is the sixth, has a notch in it. Now, one must ask himself why does that appearance differ, and the obvious answer to me is that the two vertebrae came together very sharply, because the square-like projection on the bottom—

The Court: Pardon me, let me interrupt. Is the

(Testimony of Dr. Howard M. Clemmons.)

Doctor just explaining again what his opinion was in the matter? Is there a difference between these two X-rays?

A. Their appearance is very similar.

The Court: Well, then you are not rebutting anything by the comparison. I think the other doctors have all said they appear to be the same.

Q. (By Mr. Erickson): Is there a difference in the appearance in this picture taken in March of 1959, with your pictures taken in 1958?

A. They are essentially the same.

Q. Any change in the intervertebral space between the two? A. Not essentially, no.

Q. I now show you Defendant's Exhibit 19—oh, one more question. Is there any significance to the fact that the angle is different where the picture is taken in the March X-ray, and the one you took? [429]

A. There isn't any difference or great degree of variation in position that would make any difference in the interpretation of the film.

Q. Now, comparing your X-ray with No. 19, which was also taken in March, can you see any significant difference between that X-ray and the one taken by you or under your direction?

A. There is some slight decrease in the intervertebral space in this film (indicating), as compared with the earlier one.

Q. Now, this is your earlier one here, which is No. 1, and this is the later one (indicating)?

A. Yes.

(Testimony of Dr. Howard M. Clemmons.)

Q. And there is a slight decrease in the later film, is that correct? A. Some decrease, yes.

Q. Now, is there any significance to be attached to the examination of the series of three, which includes your first one taken in November, 1958, your second one taken in April, 1959, and now this later one taken in March of 1959, is there any significant change there, and, if so, tell us what it means?

A. There is no significant change in the X-ray appearance itself, which, of course, is only one of the factors taken into consideration, as we stated earlier. [430]

Q. So as far as the X-rays are concerned, except for some slight decrease that you noted in No. 19 over your No. 1, you can see no significant change?

A. That is the only significant change.

Q. Now, if you will take the stand again, Doctor. Now, Dr. Davidson produced in court a model of the lumbar spine and the sacrum. Would you recognize that as a model that would be anatomically correct? A. Yes, sir.

Q. And it should show and would show the normal condition, particularly with relation to the angle between the lower lumbar and the sacrum?

A. That's correct.

Q. Would you illustrate on that what that angle is?

A. Well, drawing a line vertically through the body of the fifth lumbar vertebra, and another one parallel with the long axis of the upper end of the

(Testimony of Dr. Howard M. Clemmons.)

sacrum, the angle is, in this particular model, about 30 degrees.

Q. You are now indicating an angle, Doctor, that comes down along the middle of these two lower lumbar in its relationship to the axis of the sacrum, is that correct?

A. That's right; the angle between the fifth lumbar and the sacrum.

Q. Now, in comparing that model with—do you have Exhibits 2, 3, and 4 any place? Now, Doctor, if you will step down again to the viewbox here, and with the model in mind—first, [431] it has been suggested, Doctor, that the X-rays that you took or had taken, which are Exhibits 5 and 6, are taken from an angle so that they would not adequately show the angle between the lumbar and the sacrum, and further that they would not adequately represent any increase or decrease in joint space over normal. What do you have to say as to that?

Mr. Poore: Again to which the defendant objects as to improper rebuttal testimony.

Mr. Erickson: That is rebuttal, your Honor, since there was a direct attack on the exhibit.

The Court: Yes; I will overrule the objection. You may explain.

A. The two films here were both taken with the patient lying with the left side down and the film is to the patient's left, underneath the patient lying in this position, and the film in this position (illustrating), and the tube would be here (indicating). I think that is a true representation of the angle

(Testimony of Dr. Howard M. Clemmons.)

between the last lumbar vertebra and the sacrum, and, furthermore, one would expect, since the patient was not weight bearing, that is, standing and erect at the time, that the structures would be in a more relaxed position, which gives more significance to the finding of increase——

Mr. Poore: Just a minute, we object to this as not being responsive to the question. The question is just whether the [432] X-rays were taken at an angle that accurately reflects——

The Court: That's the question.

Q. You say that it does, they are taken at an angle so you can see adequately any increase or decrease in the intervertebral space in the lower lumbar, and they would also adequately show any significant change in the angle between the lower lumbar and the sacrum, is that correct?

A. Yes, sir.

Q. And it has been suggested that there is some overlapping, apparent in the picture of some vertebrae. If there is such overlapping, does it make it difficult or impossible to tell those two factors?

A. No, sir.

Q. And as an orthopedic surgeon and qualified as an expert, in your opinion, those two X-rays are sufficient and adequate to show whether or not—what the joint space is, and the intervertebral space in the lower lumbar——

A. Yes.

Mr. Poore: Just a moment——

The Court: Wait until he finishes the question.

Q. ——and the angle?

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: To which we object as leading and suggestive.

The Court: Sustained.

Q. In your opinion as an expert——

The Court: Oh, pardon me, that was an expert question? [433]

Mr. Erickson: Yes.

The Court: I am sorry; the objection is overruled.

Q. What is the answer? A. Yes, sir.

Q. They are, is that correct? A. Yes, sir.

Q. Now, then, Doctor, if you will compare those two X-rays with the model which both you and Dr. Davidson agree is anatomically correct and should represent the normal spine, and particularly the angle, will you say whether or not, by comparison of the two, there is any significant change in the angle of the lower lumbar and the sacrum as shown by the X-rays which are Exhibits 5 and 6?

Mr. Poore: To which the defendant objects upon the ground and for the reason it is merely cumulative, the plaintiff is working with her own exhibits, it is purely cumulative and corroborative of this witness' testimony previously given.

The Court: Yes; I don't see——

Mr. Erickson: Dr. Davidson says there wasn't an unusual angle and produced this model to show what the usual angle would be.

Mr. Roth: Your Honor, if it please the Court, Dr. Davidson never testified with regard to the curvature of the lumbar spine. [434]

(Testimony of Dr. Howard M. Clemmons.)

The Court: I don't think he did.

Mr. Roth: Nor did he use this model in connection—

The Court: I'll sustain the objection.

Q. Dr. Clemmons, when a patient who you are examining gives you what are called subjective symptoms, do you give those statements of subjective symptoms any value in your diagnosis?

A. Yes, sir.

Q. And would that be particularly true if the patient made the same complaints of pain relating to the same area each time you touched the area or manipulated it?

A. Yes, sir.

Q. And that is one of the bases for diagnosis, is that correct?

A. That is one of the factors taken into consideration, yes, sir.

Q. Now, in addition to the—strike that, please. You testified heretofore about nervousness of the plaintiff. Could nervousness be a possible complication of injuries that could have been received as a result of the hypothetical situation I presented to you?

A. Yes, sir.

Mr. Poore: To which the defendant objects upon the ground it is improper rebuttal, cumulative.

The Court: Yes; I don't see it rebuts anything, counsel, at [435] all.

Mr. Erickson: Dr. Davidson said he found no nervousness.

The Court: He said he found no nervousness.

(Testimony of Dr. Howard M. Clemmons.)

He had already said he had found it. They are just in conflict is all.

Mr. Erickson: Nothing further from Dr. Clemmons.

Mr. Poore: No cross-examination.

The Court: Thank you, Doctor; you are excused.

(Witness excused.)

The Court: Do you have any further rebuttal?

Mr. Erickson: Very short rebuttal, your Honor.

The Court: How short is it? Is it worth the jury's time—do you think 10 or 15 minutes would do it so they wouldn't have to come back this afternoon?

Mr. Erickson: I believe we could, your Honor.

The Court: Very well, we will try and see if we can finish it up.

MARGARET ROSA

recalled as a witness on behalf of plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Mrs. Rosa, you heard Rose Ledingham testify, did you not? A. Yes; I did. [436]

Q. Did you have a conversation with Mrs. Ledingham some time after June 24, 1958, with relation to the fall sustained by your sister?

A. Yes; I did, while I was getting some groceries at Safeway.

(Testimony of Margaret Rosa.)

Q. Did you have more than one conversation with her? A. No; that was the only one.

Q. And it was relating to the accident and your sister, is that correct?

A. Yes; she asked me how she was feeling—

Mr. Poore: To which we object upon the ground and for the reason it is merely hearsay testimony, not intending to impeach, no foundation having been laid for impeachment of any witness.

Mr. Erickson: Mrs. Ledingham was an employee—

The Court: Yes, and Mrs. Ledingham testified with reference to the conversation. Proceed, the objection is overruled.

A. She asked me how my sister felt, and I told her.

Q. Speak up.

A. She asked me how my sister was feeling, so I told her, and she told me she got a terrible fall, that everyone heard the bump that she got, and I asked her if she was the one that went to the hospital with her, and she said she was, and she said that while she was with her that she had nothing to say when she asked her how she was, and she would just nod her head, and she was afraid she would pass out completely on [437] her while she was with her.

Q. Was that the sum and substance of the conversation between you and Rose Ledingham?

A. Yes; while I was getting my groceries checked out.

(Testimony of Margaret Rosa.)

Q. Did she say anything to you at that time about your sister having talked about the weather on that trip? A. She said she said nothing.

Q. And did she say anything to you about your sister having wet shoes? A. No.

Q. That was the whole conversation, is that correct? A. That's right.

Q. Now, Mrs. Rosa, you have kept house for years, have you not?

A. Yes; I have, for 30 years.

Q. And you have kept house in homes where there is linoleum and tile on the floor, is that correct? A. Yes.

Q. Do you still do that?

A. I don't use too much wax.

Q. You have linoleum on the floor, is that correct? A. I have inlaid on the floor.

Q. And over the years have you used the so-called liquid waxes to wax your floors?

A. Yes. [438]

Q. And have you done that a good many times?

A. Yes; I have.

Q. And can you say whether or not from your experience liquid self-polishing waxes tend to build up on floors? A. Yes; it does.

Mr. Poore: To which the defendant objects on the ground and for the reason there is no showing of a proper foundation, no qualification of the witness, no proof of the similarity of conditions or the situation of the two floors or the two waxes. It is incompetent, irrelevant and immaterial.

(Testimony of Margaret Rosa.)

Mr. Erickson: May I say the only difference that I can see, your Honor, is the wax itself. One of them is Waxcraft, which she has never used, of course——

The Court: This is in rebuttal to Mr. Rodoni's testimony that it doesn't build up, is that it?

Mr. Erickson: And that it doesn't become slippery, both of them, and I believe that a housewife would probably qualify.

Mr. Poore: If it please the Court, there is two complete differences, the difference in the floor covering itself, and the difference in the two waxes. We believe the Montana rule—this is in the nature of testimony of an experiment—the Montana rule is that the conditions have to be substantially the same. We don't believe that foundation [439] has been or could be laid for that testimony.

Mr. Erickson: It will not be an experiment.

The Court: I'll overrule the objection; you may answer.

Mr. Erickson: Would you read that last question?

(Question and answer read back by Reporter.)

A. Yes; waxes do build up on floors.

Q. And that is particularly true of self-polishing?
A. Yes; all those waxes.

Q. And is it difficult to remove that wax?

A. Well, you don't remove it with soap and water.

(Testimony of Margaret Rosa.)

Q. What do you do to remove it?

A. You have to get a solution to remove it all off.

Q. You heard Mr. Rodoni say that he used extremely hot water and lye. Would that be a method?

A. Well, I don't know about lye, but I know soap and water won't take it off.

Q. Now, can you say whether or not, from your experience with liquid self-polishing wax, whether or not when it builds up, it tends to become slippery? A. Yes; they do.

Mr. Poore: Again the defendant raises the same objection for the purposes of the record.

The Court: Overruled.

Q. And do you know by comparison between paste wax and liquid wax if there is any difference in the degree of [440] slipperiness between the two?

A. I don't see any difference in it.

Mr. Erickson: That is all.

The Court: Have you had any experience with paste wax?

A. Yes.

The Court: How long did you use it?

A. Well, I have used wax for 35 years or better.

The Court: How long has it been since you have used paste wax?

A. About four or five years.

(Testimony of Margaret Rosa.)

Cross-Examination

By Mr. Poore:

Q. Mrs. Rosa, what has been your familiarity with Waxcraft Heavy Duty?

A. Well, I have never used Waxcraft.

Q. You have never seen it? A. No.

Q. Never endeavored to apply it? A. No.

Q. Never endeavored to remove it?

A. No; I have never used that wax.

Mr. Poore: No further questions.

Mr. Erickson: That's all.

(Witness excused.) [441]

MILDRED MURPHY

the plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Miss Murphy, you have heard the testimony of the witness, Rose Ledingham, have you not?

A. Yes.

Q. And she testified that on your trip from the store over to the hospital, you talked with her about the weather. Do you recall anything like that?

A. No; I didn't.

Q. Are you sure you didn't?

A. I don't recall it; yes; I am sure.

Q. What was your condition at that time?

(Testimony of Mildred Murphy.)

A. I was more or less a little on the sleepy side; I was afraid I was going to fall asleep; I was more or less trying to stay awake, and I was dazed, dizzy.

Q. How far is it from Safeway over to St. James Hospital?

A. Oh, if I stopped to count the blocks, I would know, but I couldn't do it right now.

Q. Would you say about eight or 10 blocks?

A. Oh, roughly, I don't think it's that far.

Q. You think it is less than that?

A. I think so. [442]

Q. Do you recall, Miss Murphy, whether you drove directly from the store to the hospital?

A. Yes.

Q. There were no stops any place?

A. Stop lights.

Q. But other than that, no stops?

A. No.

Q. Now, Mrs. Ledingham said she suggested to you, or didn't suggest, that she started talking about it being rainy and that your shoes were wet? Do you recall anything like that?

A. Never mentioned it as far as I know, no, she didn't say it. All she said was, "What hospital," and I said, "St. James."

Q. Do you know whether you were conscious during all that time?

A. Yes. I was dazed, but I wasn't unconscious, I know that.

Q. Now, with relation to whether it was raining, your testimony originally was that it was cloudy

(Testimony of Mildred Murphy.)

and that it may have been raining. Now, in view of Mrs. Ledingham's testimony that it actually was raining, what is your recollection?

A. You mean that day?

Q. Yes, at the time you went to Safeway.

A. It had rained.

Q. But was it raining at the time you went to Safeway? [443]

A. At that time it wasn't; it had rained.

Q. Were you wearing a raincoat? A. No.

Q. Now, her testimony is that you said your shoes were wet, and you say you didn't. Were your shoes wet?

A. Well, they couldn't be, I hadn't been out long enough to wet them. I don't see how they could be, I don't think they were.

Q. Where was your brother Frank's car parked when you left home that morning?

A. In front of the house.

Q. And the street comes right up to within 10 or 15 feet of your house, does it not?

A. Just about.

Q. Had you gotten out of the car to shop around town after you left your home and before you got to Safeway? A. No.

Q. You went directly to Safeway, is that correct?

A. No; he went down and got gas and then went up to Safeway.

Q. And you stayed in the car?

A. I stayed in the car.

(Testimony of Mildred Murphy.)

Q. Do you recall whether the sidewalk was wet under the canopy? A. No; it wasn't wet.

Mr. Poore: To which we object as merely cumulative. [444]

The Court: Overruled.

Q. Now, you have not seen these pictures before that were introduced as evidence, they being Exhibits 9, 10, 11 and 12, have you seen these before now? A. Not clearly.

Q. You will have to speak up. Now, showing you, let's start in with No. 11, would you recognize that as generally the appearance of the store, looking toward the front? A. Yes.

Q. Can you say whether or not those carts were there in the store on June 24, 1958?

A. I think so.

Q. Now, I will show you Exhibit 12 which shows the produce counter. Is that about where the produce counter was on June 24, 1958?

A. It looks like it to me.

Q. Now, there was testimony that the corner of that produce counter was rounded off in 1958, and that it may have been a little further to the right than it is on the picture. Can you say from your own recollection whether that would be true or not?

Mr. Poore: To which the defendant objects as leading and suggestive.

The Court: Well, it is, but answer this one.

A. Do you mean to say that the counter was round? [445]

Q. Yes.

(Testimony of Mildred Murphy.)

A. Well, I wouldn't pay that much attention.

Q. So you wouldn't know about that. Now, the testimony has been, and Rose Ledingham has testified that she saw you, that you were lying as indicated on Defendant's Exhibit 10, that is, with your head pointing towards the front of the store, and your feet toward the rear, and just at the entrance to the aisle where the coffee was. Now, look at that picture and see whether you agree that that is where you were?

A. Let's see that other one, I can tell from that better.

Q. You can tell better from another picture, which would be No. 9?

A. I wouldn't say. This is more like it, this one here (indicating).

Q. Now, speak up.

A. I got to about the edge of that produce counter, and then my feet were just taken from me, you know, just taken from me, and then I fell flat. It would be about there, I guess.

Q. You say "about there." Now, you are indicating that—

A. As far as I can think.

Q. You would be a little more to the left as you face the picture?

A. Yes.

Q. In other words, a little closer to the produce counter? [446]

A. That's right.

Mr. Erickson: I think that's all.

Mr. Poore: We have no cross-examination.

(Witness excused.)

Mr. Erickson: The plaintiff rests.

The Court: Very well, there is no further testimony?

Mr. Poore: No further testimony.

The Court: Very well. (Jury admonished.) You are excused from further attendance upon the Court until Monday morning, at 9:30, be back Monday morning at 9:30.

What time this afternoon shall we meet together, counsel?

Mr. Poore: At the Court's convenience, your Honor.

The Court: Shall we make it 2:00 o'clock?

Mr. Erickson: 2:00 o'clock is fine.

(Noon recess.)

(Thereafter, at 2:00 o'clock p.m. on Saturday, April 18, 1959, in the absence of the jury, the following proceedings were had:)

Mr. Poore: If the Court please, the defendant requests leave to amend the motion for judgment of dismissal which has been filed with the Court and made orally in open Court in the following particulars, namely: To change by interlineation the title from "Motion for Dismissal" to "Motion for Directed Verdict," and then by interlineation, cause the motion to read, "Comes now the defendant, Safeway Stores, Incorporated, [447] at the close of plaintiff's evidence, and after the plaintiff has rested her case in chief, and respectfully moves the Court to direct a verdict for the defendant, and dismiss

the plaintiff's action upon the following grounds and for the following reasons," and as so amended, the motion to stand.

Mr. Erickson: The objection of the plaintiff to the amended motion will be the same as to the original motion.

The Court: The motion is granted to amend, and the record can show that the objection heretofore made will stand to the amended motion.

Mr. Poore: Comes now the defendant after the close of all the evidence and after both parties have rested, and respectfully moves the court for a directed verdict upon the grounds and for the reasons as specified in the motion for directed verdict which the Court now has under advisement, and upon the further ground and for the further reason that no evidence whatsoever has been adduced by either party in the trial of the case from which reasonable men could conclude that the plaintiff fell as the direct and proximate result of any negligent act or omission of this defendant pertinent to the maintenance of its store floor.

Mr. Erickson: I would object to that motion, your Honor, on the same grounds heretofore given, plus the fact that we believe all the evidence shows the existence of actionable negligence and the injury resulting as the proximate cause [448] thereof.

The Court: I will reserve ruling on the motion and we can proceed to settle instructions.

(Thereupon, the further trial of said cause was recessed until Monday morning, April 20,

1959, at 9:30 o'clock a.m., at which time the following proceedings were had in the presence of the jury:)

The Court: Let the record show that plaintiff has withdrawn Proposed Instructions Nos. 2, 5, 6, 9, 10, 12, 13 and 14, and the Court will give Plaintiff's Instructions 1, 4, 7, 8, 11, 11a, 15 and 16, and the Court has refused Plaintiff's Instruction 3; and that the defendant has withdrawn its Proposed Instructions 1, 2, 3, 4, 5, 14, 15, 18, 23, 24, 25, 26, 27 and 28, and that the Court has refused No. 9, as included in the instructions that will be given; and the Court will give Defendant's Instructions 6, 7, 8, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, and you may put those in the file.

The parties may have each an hour to argue, and the plaintiff may now open.

(Thereafter, Mr. Erickson opened the arguments on behalf of the plaintiff, Mr. Poore argued the case on behalf of the defendant, and Mr. Erickson closed the arguments on behalf of plaintiff, and thereafter the Court instructed the jury as follows:) [449]

Jury Charge

The Court: Ladies and gentlemen of the jury, you have now heard the evidence in the case and the arguments of counsel, and it is now the time for me to instruct you with reference to the law governing the case, and although you, as jurors, are the sole judges of the facts of the case, you are

duty bound to follow the law as stated by me in these instructions, and apply the law so given to you to the facts as you find them from the evidence before you.

Now, in considering these instructions that I give you, do not single out any one instruction or any one thing I say along as stating the law, but consider everything I have to say, all of my instructions as a whole.

Now, you are not concerned with the wisdom of the law, as I pointed out to you when you were examined at the start of the case. Regardless of any opinion you may have as to what the law is, or what it ought to be, it is your sworn duty to base a verdict only upon the law as I give it to you.

Now, in the first place, let me say this: This is a case involving on the one hand an individual and on the other hand Safeway Stores, a corporation. In deciding the issues of this case, don't differentiate between the individual and the corporation. Each one of them comes here before this Court and before you, as officers of this Court, entitled to a fair and impartial trial, and you can only give each of [450] the parties that if you treat them equally. This Court and our system of justice is not designed so that the well to do, or the corporations are above the law in any regard, nor that the poor do not have the full opportunity for the protection of the law, but all, individuals and corporations, rich and poor alike, are to be treated equally in the Court, to be treated equally by you jurors, and in that connection, I suggest to you that the sugges-

tions of counsel that the corporation is well able to pay for any damages that it may have caused is not for your consideration. The thing that you have to determine is, did they cause the damage, and, if so, what is that damage, not whether they can pay it or not, or whether you should be liberal or not with somebody else's money, but what are the damages.

The case is, as has been suggested by counsel, not too involved, as you understand from the arguments of counsel and the evidence that has been presented to you. The plaintiff on the one hand says that she walked into Safeway Store, who invited her in by having a store there to sell groceries, invited her in there, and she walked in, walked in carefully, just as she had on many, many occasions, and then walking on the floor, suddenly her feet slipped out from under her, and she fell, receiving the injuries that have been described to you. She alleges that that falling and that slipping that she suffered were the result of the negligence of the defendant, [451] and that the injuries that she has received are the result of that fall.

Now, on the other hand, the defendant has denied that it, the Safeway Stores, through its agents and servants, is responsible, that they are at fault. They deny that they were negligent. They don't deny that Miss Murphy fell, but they deny that they were responsible, that they were negligent, that they did anything to cause her to fall, and on the other hand say if there is any negligence here, it was the contributory negligence of the plaintiff herself, Miss

Murphy, that caused her injuries. That's the simple status of the case.

Now, in that connection, the burden is upon the plaintiff, Miss Murphy, to prove by a preponderance of the evidence that the defendant was negligent, and that such negligence was the proximate cause of injury to her.

Now, first let me say that by a preponderance of evidence is meant the greater weight of the evidence, as you analyze it. Not how many testified to one thing, as compared to how many testified contrarily, but where does the weight of the evidence lie in the light of what everyone has said, and in the light of the other physical facts or other exhibits or other evidence in the case.

You are also instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have [452] done. In other words, negligence is the failure to use ordinary care under the circumstances. Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

As I have said, the burden is upon the plaintiff to prove her case by a preponderance of the evidence, that the injury was caused by the negligence of the defendant, and that that negligence was the proximate cause of the injuries that she suffered, if any, and in that connection, you are instructed

that proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any new cause, produces the injury, and without which the injury would not have occurred.

Now, I think, as has been stated by both counsel in the course of their argument to you, neither the fact of injury, if any, to the plaintiff, nor the mere fact that an accident happened, considered alone, support an inference of negligence on the part of the defendant.

And you are instructed that in this case there is no burden upon the defendant to show how the accident happened, but the burden is upon the plaintiff to prove to your satisfaction, by the preponderance of the evidence, that it happened as the direct and proximate result of some negligent act of omission of the defendant. As I have explained to [453] you, preponderance of the evidence means just the greater weight of the evidence.

In that connection, you are instructed that the testimony of one witness is sufficient to—one witness who satisfies your minds is sufficient to prove any fact in the case.

Your power of judging the effect of evidence in the case is not arbitrary. It must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound, as I said, to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number, or as against a

presumption or other evidence which does satisfy your mind. As I say, you are the sole judges of the credibility of the witnesses and the weight that their testimony deserves.

In the first place, a witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, or by the character of the testimony that he gives, or by contradictory evidence. So you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of your belief. Consider each witness' intelligence, motive and state of mind, his demeanor and manner while testifying on the stand, and consider also the relation each witness may bear to either side of the case, or [454] the manner in which any witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Now, inconsistencies and discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you, as the jury, to discredit such testimony. Two or more persons witnessing an incident or an accident, or reporting a conversation, may see or hear it differently, and innocent misrecollection is a thing that we are all aware of, just like the failure to recollect at all. It is not an uncommon experience for any of us. But, in weighing the effect of a discrep-

ancy in the testimony of witnesses, consider whether it pertains to a matter of importance, or just of unimportant detail, and whether the discrepancy results from innocent error or forgetfulness, or from wilful falsehood. Now, if you find that the presumption of truthfulness is outweighed as to any witness, then you will give the testimony of that witness just such credibility, if any, as you may think it deserves. You are the judges of that. In deciding on which side the preponderance or weight of evidence is, the jury should take into consideration the opportunity of the several witnesses of seeing or knowing the things about which they testify, their conduct and demeanor while testifying, and their interest or lack of interest in [455] the result of the case, the relationship or connection, if any, between the witness and the parties, and the apparent consistencies and fairness of the evidence, the probability or improbability of the truth of their statements, in view of all the other evidence and facts and circumstances which have been proved upon the trial; and from all of these circumstances of the case, determine upon which side, then, the preponderance of the evidence and the weight lie.

Now, in connection with weighing the credibility of witnesses and the weight you should give the testimony of the various witnesses, you are advised and instructed that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses, that is, a person

who, by education, study and experience, has become an expert in an art or profession, and who is called as a witness to give his opinion as to any such matters in which he is versed and experienced, and which is material to the case. Now, you should consider such expert opinion, that is, the doctors who testified here, they were qualified as experts and gave voice to their opinions in the matter, so you should consider the expert opinions of the doctors, and should weigh the reasons, if any, given for their opinions. You are not bound by the opinion of any one or any of them, but give to the expert opinion the weight which you deem it is entitled to, [456] whether that be great or slight, and you may reject it, as I say, if, in your opinion, the reasons given for it are not sound and carry no conviction to you. In this case, there is a conflict, a conflict exists in the testimony of the expert witnesses, and you must, then, as jurors resolve the conflict, and to that end you must weigh one expert's opinion against that of the other and the other evidence in the case, and the reasons given by the one against those of the other, and the relative credibility and knowledge of the experts who have testified. That is one of the problems that you have as judges of the facts of this case.

Now, the defendant, as I think I mentioned earlier, the defendant is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in con-

temptation of law, the acts and omissions of the corporation, whose agent he is. Now, there is no argument in this case that the store was operated by the manager of the Safeway corporation, and the waxing and the cleaning of the store was done by agents of the Safeway corporation, and so you have no problem with reference to that. The acts described were done by agents, servants of the corporation, and are, therefore, the acts of the defendant corporation.

Now, when a store is open for business like the Safeway [457] store here, one who enters it to purchase groceries as they sell them there does so at the implied, if not the express, invitation of the Safeway Stores, the owner of the store, and that person who goes in there is called an invitee, and upon the owner of the store the law places the duty to exercise ordinary care so as not unnecessarily to expose the invitee, the patron, to danger or accident, and to that end to keep the store in a reasonably safe condition, and to keep the aisles and passageways, and the general store premises made available for the patron's use, to keep them safe, in a reasonably safe condition so as not to expose such patron to danger or injury.

In applying the rules of law that have been and will be further stated to you by the Court to the facts of this case, and in judging the conduct of the parties, you may consider the fact that the attention of persons who visit stores ordinarily is attracted by the display of the goods and wares, the

groceries and other articles offered for sale, and they may be more or less absorbed by the transactions which they have in mind when they go into the store to buy. You may consider whether the defendant anticipated that fact with ordinary care in the exercise of the duty which I have already defined, and also whether the plaintiff here, Miss Murphy, did or did not share that ordinary experience of store business of looking around and being occupied with the transactions she [458] had in mind, and, if so, what effect that fact had on her conduct in relation to the cause of the accident here. Storekeepers are under the duty to keep the floors of their premises reasonably safe, as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business.

In this connection, you are advised that Safeway Stores, however, is not an insurer of the safety of its customers. It is bound only to use ordinary care to keep its store premises in such a condition that those invited there may not be unnecessarily exposed to danger. The fact that a floor is polished

or slick does not of itself establish that the store owner is negligent in his choice or application of the floor dressing, or that it is dangerous to the public, or to those invited to use it. A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is [459] negligent in the materials he uses for the treatment or the manner of applying them, or the creation of a dangerously slippery condition, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.

Slipperiness is an elastic term, of course. It does not necessarily follow from the fact that a store floor is slippery that the store owner has been negligent, and that the floor is dangerous to walk on. It is the degree of slipperiness that determines whether reasonable care has been exercised in maintaining the floor and whether the floor is reasonably safe for use. Now, whether this particular floor in this case was slippery, and, if so, whether it was so slippery as to be dangerous to walk on at the time the plaintiff was using it is a question of fact for you to determine from a preponderance of the evidence and the instructions of the Court, as I am giving them to you.

The mere fact that some act or omission of the plaintiff contributed to her injury does not of itself bar a recovery by her. A plaintiff is barred from recovery under the theory of contributory negli-

gence only if some conduct of her own was negligent, and was also a proximate cause of her injury. Have in mind also that the defense of contributory negligence is an affirmative defense, and if it has not been established by a preponderance of the evidence, your finding on that issue [460] as to whether or not there has been contributory negligence must be then in favor of the plaintiff, if the defendant, as I say, has not established the defense by a preponderance of the evidence. The test of contributory negligence is whether the plaintiff in the circumstances acted as an ordinarily prudent woman.

Now, the fact that this case is submitted to you for decision is not indication whatever that there is or is not liability on the part of the defendant, nor is it any indication that in the opinion of the Court there is or is not liability. It is for you to determine from the evidence, and the law as given by these instructions whether or not there is liability, and you must determine this question first, and if you find that the plaintiff has not established a case of liability by a preponderance of the evidence, you shall not consider any other question in the case, but shall find for the defendant, Safeway Stores.

If, on the other hand, you should find that the defendant, Safeway Stores, is liable under these instructions and the evidence, then you shall consider the question of damages. The amount sued for by the plaintiff in her complaint is no criteria of the measure of the amount of damages which

you should award the plaintiff, other than you may in no event allow anything in excess of that amount. The amount sued for here is the sum of \$59,650, so under no event could you allow [461] more than that.

If under my instructions here and the facts you should find that the plaintiff is entitled to a verdict against the defendant, it will then be your duty to award plaintiff such amount of damages as will compensate her reasonably for all detriment suffered by her, and of which defendant's negligence, as found by you, if you so find, was a proximate cause, whether such detriment could have been anticipated or not. If, under my instructions, you should find that the plaintiff is entitled to a verdict, then, in arriving at the amount of the award, you shall determine each of the items of claimed damage which I am now about to mention to you, provided that you find them to have been suffered by her, and as the proximate result of the negligence of the defendant:

1. The reasonable value, not exceeding the cost to said plaintiff, of the examination, attention and care by physicians and surgeons reasonably required and actually given in the treatment of the plaintiff, and reasonably certain to be required to be given in her future treatment, if any, and including such care, X-ray pictures, if any, as are reasonably necessary. In this connection, as was mentioned, I think, by counsel both for the plaintiff and the defendant, you are to eliminate from any

fixing of damages the amount charged by Dr. Clemmons for his examination of Miss Murphy. As was explained to you, I believe, by counsel themselves, Dr. [462] Clemmons did not treat Miss Murphy as an attending and treating physician concerned with and responsible for her care, but only examined her for the purposes of being an expert witness and testifying in the trial of the case, so you will not allow any damages, if, under all of these instructions, you ever arrive at the point where you consider the question of damages, you will not allow any damages for the expenses charged by Dr. Clemmons.

2. The reasonable value, not exceeding the cost to said plaintiff, of hospital accommodations and care, if any, reasonably required and actually given in the treatment of the plaintiff, and reasonably certain to be required to be given in her future treatment, if any.

3. The reasonable value of time lost, if any, from employment by the plaintiff since her injury wherein she has been unable to resume her occupation. In determining this amount, you should consider evidence of the plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned in the time lost had she not been disabled, if you find she is so disabled. If you should find that the plaintiff's power to earn money has been so impaired by the injury in question that she will suffer a loss of

earning power in the future from that impairment, then you will award her such sum as will compensate her [463] reasonably for such future detriment as she is reasonably certain to suffer. Even if a person was not gainfully employed at the time of the alleged wrongful conduct whereby she was injured, if a partial or total disability resulting from such injury is reasonably certain to continue for any period of time in the future, the person, nevertheless, could suffer pecuniary loss, then, from the disability.

If, under these instructions, you should find that the plaintiff is entitled to a verdict, you will consider not only the elements of damage heretofore mentioned, but you will also award her such sum as will compensate her reasonably for the pain, discomfort, fears, anxiety and other mental and emotional distress, if any, that have been suffered by her, and which proximately result from the injury in question, and for such like detriment, if any, as she is reasonably certain to suffer in the future from the same cause. The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such an injury. The law does require, however, that when making an award for pain and suffering, the jury shall exercise its authority with calm and reasonable judgment and common sense, and that the damages shall be just

and reasonable in the light of the evidence, and shall not exceed, as I say, in any event, the [464] amount prayed for in the complaint.

Now, during the course of the trial, ladies and gentlemen of the jury, I occasionally, I believe, asked some questions. Now, I did that in order just to bring out facts that I did not think at that time had been fully covered in the testimony. Under the law, under the federal law, I, the judge, am entitled to comment on the evidence to you. In other words, I could tell you what I think the evidence establishes or proves, so long as I left it up to you finally to determine it. I could express my opinion to you, under the law. That is not so in all courts, but it is so in the federal court. Now, while I have that power and that right, so to speak, of telling you what I think about the case, I don't intend to tell you, and I don't want you to think from any questions that I may have asked during the course of the trial that I have any opinion as to the facts that were developed. I have no opinion on that, and I don't intend and don't want to convey to you any impression that I have an opinion one way or the other as to any of the facts of the case. You are the judges of the facts of the case, and you are more capable of deciding those facts than I am, surely, and I recognize that, and I accept it, and, well, I am a great believer in the jury system, just let me say that; that's your job, and I'll do my job and you do your job, and I'll be responsible for mine, but you have to be responsible for yours. [465]

That's the way I feel about any case that is presented here, so put out of your mind any idea that you may have gotten from any expression that I may have made, any question that I may have asked, any ruling that I may have made upon the offer of evidence. None of those things are to, in any way, be considered by you as any indication of how I feel in the matter. You are the judges of the facts of the case under the law as I give it to you.

Now, upon retiring to your jury room, you will select one of your number to act as foreman, and the foreman will preside over your deliberations and be your spokesman in court.

Forms of verdict have been prepared for your use. The one form is—in the event that under these instructions and the facts of the case, as you determine them, if your verdict were for the plaintiff, the form provides, after stating the title of the court and the cause, “We, the jury, in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at blank. Dated this blank day of April, 1959.” Now, if that is your verdict, if your verdict is in favor of the plaintiff, the foreman will fill in the blank amount of money damages, fill in the date, and sign his name as foreman, and then you will return into court.

On the other hand, if your verdict under the evidence and [466] these instructions is in favor of the defendant, he will sign this form of verdict,

which, after stating the title of the court and the cause, provides: "Verdict, We, the Jury, in the above-entitled action, find our verdict in favor of the defendant. Dated this blank day of April, 1959, blank, Foreman." If that is your verdict in favor of the defendant, the foreman will fill in the date and sign his name as foreman and return that verdict into court.

I think it is proper to add finally this caution to you that nothing said in these instructions, and nothing in the forms of the verdict or the order in which I read them or anything about this case at all is to suggest to you or to convey to you in any way or manner any intimation of what verdict I think you should find. That is your exclusive duty and responsibility, too. You have a sworn duty here to act as judges of the facts of this case, and exercise that duty with fairness and with common sense.

Are there any objections or exceptions—

Mr. Erickson: None for the plaintiff.

Mr. Poore: None for the defendant.

The Court: Very well. Have the bailiffs been sworn?

The Clerk: No, your Honor.

The Court: Very well, come forward.

(Bailiffs sworn.)

The Court: I might say, ladies and gentlemen of the jury, [467] if, in the course of your deliberations, you want to communicate with me about any matter, the foreman can write a note and give it to the bailiff, who will deliver it to me. Don't send

any messages by word of mouth. Write out any note you want to send to me.

I might also say that your verdict in this case must be unanimous. In the federal courts, all verdicts must be unanimous. That means that each one of you must agree to the verdict returned. You cannot arrive at a verdict until there are 12 of you agreed upon that verdict.

Is there anything further?

Mr. Erickson: Nothing further, your Honor.

Mr. Poore: Nothing further, your Honor.

The Court: Very well. Now, I have got one more suggestion to you. I am like the lawyers, just one more word. It is just about noon time. Now, if I were you, I would go out and elect a foreman of your jury, and then tell the Marshal that you want to go eat.

Proceed at this determination calmly, don't rush into it. Go eat lunch and then come back and go to work.

The Court will stand in recess awaiting the return of the verdict.

(Thereupon, at 11:50 a.m. April 20, 1959, the jury retired to consider its verdict. Thereafter, at 3:50 o'clock p.m., the same day, the jury returned into Court and the [468] following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I received a note from the bailiff which reads as follows: "According to the law, what is negligence or a negligent act, written instructions of judge?"

Now, let me say first that under the federal system the jury is not given and is not permitted to have any written instructions of the law, but I may answer your question this way by saying that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or, it is the doing what such a person under the existing circumstances would not have done.

In that connection, and with reference to this case, you are instructed that a store owner, such as Safeway, the defendant here in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store, unless he is negligent in the materials he uses for such treatment, or the manner of applying them, or the creation of a dangerously slippery condition, so that thereafter it is not reasonably safe for its intended use by the customers, for people to walk on.

Further, the fact that a store floor is polished or slick does not of itself establish that the store owner is [469] negligent in his choice or application of the floor dressing, or that it is dangerous to the public. Storekeepers are under the duty to keep the floors of their premises reasonably safe for the business invitees, for the patrons that come into the store and who must pass over the floor. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the duty to use ordinary prudence and caution to avoid injury to those who do

come upon his premises by invitation, the patrons of the store. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for his invitees.

Now, does that answer your question? Very well. I hope that the way I talked you understood me. I have had a little dental work done since we met earlier today, and the novocain is still there.

You will go back with the Marshal, then, to your jury room and continue with your deliberations, and Court will stand in recess awaiting the return of the jury.

[Endorsed]: Filed September 28, 1959. [470]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 33 pages numbered consecutively from 1 to 33, inclusive, together with the Transcript of Evidence, is a full, true and correct Transcript consisting of the original papers designated by the parties, to wit: Complaint, Petition for Removal, Notice of Removal, Bond on Re-

moval, Answer, Verdict, Judgment, Defendant's Motion for Judgment in Accordance With the Motion for a Directed Verdict or for a New Trial, Court's Order of July 1, 1959, Overruling and Denying Defendant's Alternative Motions for Judgment N.O.V. or for a New Trial, Notice of Appeal, Supersedeas Bond, Order Extending Time for Filing Record and Docketing Appeal, and this Designation, as required by rule as the Record on Appeal in Case No. 690, Mildred Murphy vs. Safeway Stores, Inc., as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that as part of Record on Appeal, Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and Defendant's Exhibits Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39 all of which said Exhibits were received in evidence at the trial of said case.

Witness my hand and the seal of said District Court at Butte, Montana, this day of October, 1959.

[Seal]

DEAN O. WOOD,
Clerk;

By /s/ D. F. HOLLAND,
Deputy Clerk.

[Endorsed]: No. 16649. United States Court of Appeals for the Ninth Circuit. Safeway Stores, Incorporated, Appellant, vs. Mildred Murphy, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: October 21, 1959.

Docketed: October 26, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16649

MILDRED MURPHY,

Plaintiff and Respondent,

vs.

SAFEWAY STORES, INC.,

Defendant and Appellant.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in refusing to grant defendant's Motion for Directed Verdict made at the close of plaintiff's case in chief.
2. The Court erred in refusing to grant defendant's Motion for Directed Verdict made at the close of all the evidence.
3. The Court erred in refusing to grant Defendant's alternative Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 28, 1959.